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U. S. Supreme Court

UNITED STATES REPORTS

VOLUME 240

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1915

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
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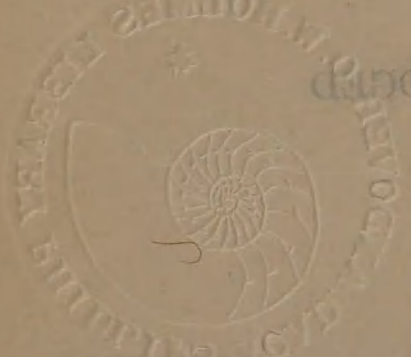

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.[2]
CHARLES EVANS HUGHES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JOSEPH RUCKER LAMAR, Associate Justice.[3]
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

[2] Mr. Justice Day was absent from the bench on account of illness from January 3, 1916, until after the publication of this volume.

[3] Mr. Justice Lamar on account of illness did not take his seat upon the bench during October Term 1915. He died at his residence at Washington on January 2, 1916. See page iii, 239 U. S. Further reference to Mr. Justice Lamar will appear in volume 241 U. S.

On January 28, 1916, President Wilson nominated Louis D. Brandeis of Massachusetts to succeed Mr. Justice Lamar deceased; he was confirmed by the Senate on June 1, 1916; his commission was dated June 1, 1916, and he took his seat upon the bench June 5, 1916.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER 19, 1914.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, CHARLES E. HUGHES, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, JOSEPH R. LAMAR, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

[1] For previous allotment see 234 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1915.

BRUSHABER *v.* UNION PACIFIC RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 140. Argued October 14, 15, 1915.—Decided January 24, 1916.

Under proper averments a stockholder's suit to restrain a corporation from voluntarily paying a tax charged to be unconstitutional, is not violative of Rev. Stat., § 3224, and the District Court has jurisdiction to entertain the action. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.

In this case—that of a stockholder against a corporation to restrain the latter from voluntarily paying the income tax imposed by the Tariff Act of 1913,—the defendant corporation notified the Government of the pendency of the action, and the United States was heard as *amicus curiæ* in support of the constitutionality of the Act.

The Sixteenth Amendment was obviously intended to simplify the situation and make clear the limitations on the taxing power of Congress and not to create radical and destructive changes in our constitutional system.

The Sixteenth Amendment does not purport to confer power to levy income taxes in a generic sense, as that authority was already pos-

sessed, or to limit and distinguish between one kind of income tax and another; but its purpose is to relieve all income taxes when imposed from apportionment from consideration of the source whence the income is derived.

The Income Tax provisions of the Tariff Act of 1913 are not unconstitutional by reason of retroactive operation, the period covered not extending prior to the time when the Amendment was operative; nor are those provisions unconstitutional under the due process provision of the Fifth Amendment; nor do they deny due process of law, nor equal protection of the law by reason of the classifications therein of things or persons subject to the tax.

The provisions for collecting income at the source do not deny due process of law by reason of duties imposed upon corporations without compensation in connection with the payment of the tax by others.

The uniformity of taxation required by the Federal Constitution is geographical. *Knowlton* v. *Moore*, 178 U. S. 41.

The Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution.

Arguments as to the expediency of levying a tax which is within the power of Congress to levy are beyond judicial cognizance.

When there are differences between the subjects that are taxed, Congress does not transcend the limit of its taxing power by taxing them differently.

A want of due process of law does not arise from want of wisdom in Congress in levying taxes and thus give the courts power to overrule the action of Congress by declaring it to be unconstitutional.

THE facts, which involve the construction of the Sixteenth Amendment and other provisions of the Constitution of the United States, and the constitutionality of the Income Tax provisions of the Tariff Act of October 9, 1913, are stated in the opinion.

Mr. Julien T. Davies, with whom *Mr. Brainard Tolles*, *Mr. Garrard Glenn* and *Mr. Martin A. Schenck* were on the brief, for the appellant:

The effect of the Sixteenth Amendment was merely to waive the requirement of apportionment among the States, in its application to a general and uniform tax

upon incomes from whatever source derived. The Income Tax Law of 1913, except in so far as the tax thereby imposed is in reality such a general and uniform tax on incomes, derives no support from the Sixteenth Amendment.

So much of the act of 1913, as subjects certain corporate earnings to the normal tax of one per cent. as income of the operating corporation, and again subjects the same earnings to a like tax while in process of distribution to the beneficial owners through the instrumentality of an intermediate corporation, operates as a discrimination in the nature of a penalty on corporations holding stock in other corporations and necessarily conflicts with the right of the several States to determine for themselves the permissible forms and modes of ownership of property.

The provisions complained of constitute a departure from the general plan of the act.

Holding stock in other corporations is not a legitimate basis of classification in a Federal tax law.

The authorities condemn arbitrary selection under the guise of classification.

The provisions of the statute which require collection at the source by corporations, debtors, fiduciaries and employers involve the taking of property without due process of law and the taking of private property for public use without compensation and are invalid.

Unapportioned compulsory service is not a tax.

Provision for just compensation is essential.

The act not only exacts labor without compensation, but exposes one collecting the income at the source to unnecessary risks and perils.

The act involves unreasonable discriminations and arbitrary classification.

The statute is invalid in the particular of seeking to tax income received prior to October 3, 1913.

The entire assessment of income tax against the defendant for the year 1913 is invalidated by the inclusion therein of the amount improperly assessed relative to the income received between March 1, 1913, and October 3, 1913.

In support of these contentions, see *Alexandria Canal Co.* v. *District of Columbia*, 1 Mackey, 217; 5 Mackey, 376; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548; *Attorney General* v. *Old Colony R. R.*, 160 Massachusetts, 62; *Barnes* v. *Railroads*, 17 Wall. 294; *Biddle's Appeal*, 97 Pa. St. 278; *In re Chapman*, 166 U. S. 661; *Chicago, B. & Q. Ry.* v. *Chicago*, 166 U. S. 226; *Chicago, M. & St. P. R. R.* v. *Wisconsin*, 238 U. S. 491; *Clarke* v. *Strickland*, 2 Curt. 439; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Santa Clara County* v. *Southern Pacific R. R.*, 18 Fed. Rep. 385; *S. C.*, 118 U. S. 394; *San Mateo County* v. *Southern Pacific R. R.*, 13 Fed. Rep. 145; *In re Farrell*, 212 Fed. Rep. 212; *Freeland* v. *Hastings*, 10 Allen, 570; *Goodwin* v. *McGaughey*, 108 Minnesota, 248; *Gray* v. *Darlington*, 15 Wall. 63; *Guy* v. *Baltimore*, 100 U. S. 434; *Haight* v. *Railroad Co.*, 6 Wall. 15; *James* v. *Campbell*, 104 U. S. 356; *Johnson* v. *Colburn*, 36 Vermont, 693; *Joyner* v. *Third School District*, 3 Cush. 567; *Kalbach* v. *Clark*, 133 Iowa, 215; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Lacey* v. *Davis*, 4 Michigan, 140; *Lake Shore R. Co.* v. *Smith*, 173 U. S. 684; *Libby* v. *Burnham*, 15 Massachusetts, 144; *Loan Assn.* v. *Topeka*, 20 Wall. 655; *Louis. & Nash. R. R.* v. *Stockyards*, 212 U. S. 132; *McCoach* v. *Minehill Ry.*, 228 U. S. 295; *McCulloch* v. *Maryland*, 4 Wheat. 316; *McCully* v. *Railroad*, 212 Missouri, 1; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Mayor* v. *Cooper*, 131 Georgia, 670; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461; *Merchants' Ins. Co.* v. *McCartney*, 1 Lowell, 447; *Minnesota Rate Cases*, 230 U. S. 352; *Mo. Pac. R. R.* v. *Larabbee Mills*, 211 U. S. 612; *National Deposit Co.* v. *Stead*, 232 U. S. 58; *New*

Jersey v. *Anderson*, 203 U. S. 483; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Cornell* v. *Davenport*, 30 Hun, 177; *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 601; *Richards* v. *Washington Terminal*, 233 U. S. 546; *San Bernardino County* v. *Southern Pacific R. R.*, 118 U. S. 417; *Scholey* v. *Rew*, 23 Wall. 331; *Southern Ry.* v. *Greene*, 216 U. S. 400; *Stetson* v. *Kempton*, 13 Massachusetts, 272; *Stockdale* v. *Insurance Cos.*, 20 Wall. 323; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Sun Mutual Ins. Co.* v. *Mayor*, 8 N. Y. 241; *Toone* v. *The State*, 178 Alabama, 70; *Union Bank* v. *Chicago*, 3 Biss. 82; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *United States* v. *Fox*, 95 U. S. 670; *United States* v. *Harris*, 106 U. S. 629; *United States* v. *Mitchell*, 58 Fed. Rep. 993; *United States* v. *Singer*, 15 Wall. 111; *United States* v. *Railroad Co.*, 17 Wall. 322; *United States* v. *Welch*, 217 U. S. 333; *Ward* v. *Maryland*, 12 Wall. 418; *Worthen* v. *Badgett*, 32 Arkansas, 496.

The Solicitor General and *Mr. Assistant Attorney General Wallace* for the United States, as *amicus curiæ*, by leave of the court, in support of the decree appealed from:

Sections 3224 and 3226, Rev. Stat., preclude this remedy and leave this court without jurisdiction of this action. These statutes are constitutional. *Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 272, 282; *Nichols* v. *United States*, 7 Wall. 122; *United States* v. *Pacific Railroad*, 4 Dillon, 66; *Snyder* v. *Marks*, 109 U. S. 189; *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Pullman Car Co.*, 139 U. S. 658; *Straus* v. *Abrast Realty Co.*, 200 Fed. Rep. 327; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455, 459; *Hawes* v. *Oakland*, 104 U. S. 450.

Taxes, when laid on income derived from realty or invested personalty, are direct taxes and before the Sixteenth Amendment were not subject to the rule of uniformity. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 557; *Spreckels*

Sugar Co. v. *McLean*, 192 U. S. 397, 413; *License Tax Cases*, 5 Wall. 462, 471; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 177; *Southern Ry.* v. *King*, 217 U. S. 534; *Hatch* v. *Reardon*, 204 U. S. 160.

The Sixteenth Amendment removed the restriction of apportionment as to such income taxes as before were subject thereto.

The Constitution does not impose any implied or inherent rule of uniformity on the taxing power. *Pollock* v. *Farmers' L. & T. Co.*, *supra*, 557; *License Tax Cases*, *supra*, 462, 471; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, *supra*.

Nor can such requirement be developed from the due process clause of the Fifth Amendment; or the due process or equal protection clauses of the Fourteenth Amendment. *Billings* v. *United States*, 232 U. S. 261, 282.

The rule of general uniformity is not violated by exemption, classification or discrimination, unless so arbitrary or outrageous as to indicate favoritism or prejudice. *Knowlton* v. *Moore*, 178 U. S. 41; *Flint* v. *Stone Tracy Co.*, *supra*, 107; *Cook* v. *Marshall County*, 196 U. S. 261, 274; *Nicol* v. *Ames*, 173 U. S. 509, 521.

The express uniformity clause requires not intrinsic, but only geographical uniformity. *Knowlton* v. *Moore*, *supra*, 106; *Billings* v. *United States*, *supra*, 282.

Neither the Fifth nor the Fourteenth Amendment, if operative, would forbid reasonable exemption, classification or discrimination. *Dist. of Col.* v. *Brooke*, 214 U. S. 138, 150; *Second Employers' Liability Cases*, 223 U. S. 1, 52, 53; *Barrett* v. *Indiana*, 229 U. S. 26, 29; *Int. Harvester Co.* v. *Missouri*, 234 U. S. 199, 214, 215; *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69; *Lindsley* v. *Natural Gas Co.*, 220 U. S. 61, 78; *Gibbons* v. *Dist. of Col.*, 116 U. S. 404; *Beers* v. *Glynn*, 211 U. S. 477; *Magoun* v. *Illinois Sav. Bank*, 170 U. S. 299; *Welch* v. *Cook*, 97 U. S. 541; *Home*

of the Friendless v. *Rouse*, 8 Wall. 430; *Salt Co.* v. *East Saginaw*, 13 Wall. 373.

Reasonable selection and classification is peculiarly a function of the Congress. Cooley on Const. Lim., 3d ed., 739; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *McCray* v. *United States*, 195 U. S. 27, 57, 61; *Veazie Bank* v. *Fenno*, 8 Wall. 548; *Treat* v. *White*, 181 U. S. 264, 269; *Flint* v. *Stone Tracy Co.*, *supra*, 167; *Lindsley* v. *Natural Gas Co.*, *supra*, 78; *Int. Harvester Co.* v. *Missouri*, *supra*, 215; *Barrett* v. *Indiana*, *supra*, 29, 30; *Nicol* v. *Ames*, *supra*, 521.

Those assailing a legislative classification carry the burden of demonstrating its unreasonableness. *Nicol* v. *Ames*, *supra*, 514, 515; *Lindsley* v. *Natural Gas Co.*, *supra*, 78, 79.

None of the exemptions or discriminations here complained of are unreasonable, nor do they produce lack of uniformity. *Flint* v. *Stone Tracy Co.*, *supra*, 178; *Home of the Friendless* v. *Rouse*, *supra*; *Salt Co.* v. *East Saginaw*, *supra*; *Gibbons* v. *District of Columbia*, *supra*; *Knowlton* v. *Moore*, *supra*, 109; *Peacock* v. *Pratt*, 121 Fed. Rep. 772, 777; *Pollock* v. *Farmers' L. & T. Co.*, *supra*, 675, 676.

They were all within the power of selection and classification.

For taxation purposes there are fundamental distinctions between individuals and corporations. Black on Income Taxes, 28; *Flint* v. *Stone Tracy Co.*, *supra*, 158, 161; *Nicol* v. *Ames*, *supra*, 521; *Kentucky R. R. Tax Cases*, 115 U. S. 321, 337, 339; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 354; *Income Tax Cases*, 148 Wisconsin, 456.

Capital stock held by corporations may be distinguished from that held by individuals. *Tennessee* v. *Whitworth*, 117 U. S. 129, 136, 137; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Powers* v. *Detroit &c. Ry.*, 201 U. S. 543, 559, 560; *Flint* v. *Stone Tracy Co.*, *supra*, 150.

There is no objectionable discrimination in the provi-

sion allowing deductions of interest paid. *Flint* v. *Stone Tracy Co.*, *supra*, 169, 171.

This tax is not an infraction of the state power to authorize formation of corporations, etc. *Flint* v. *Stone Tracy Co.*, *supra*, 152, 153, 158.

The "source collection" provisions are valid. *Bank* v. *Commonwealth*, 9 Wall. 353, 363; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; Cooley on Taxation (3d ed.), 832, 834; *Patton* v. *Brady*, 184 U. S. 608, 620, 621; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 239; *Cummings* v. *National Bank*, 101 U. S. 153, 156; *National Deposit Co.* v. *Illinois*, 232 U. S. 58, 70; Gray on Limitations of Taxing Power, § 1196; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 444; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 465; *Carstairs* v. *Cochran*, 193 U. S. 10; *Union Bank* v. *Richmond*, 94 Virginia, 316; *Commonwealth* v. *Citizens' Bank*, 117 Kentucky, 946.

The so-called retroactive feature is not objectionable. Previous statutes had like provisions. 12 Stat. 292, 473, 474; 13 Stat. 223, 281, 283, 417; 14 Stat. 471, 478, 480; 16 Stat. 256; 28 Stat. 553, § 27; Chap. 35, 5 & 6 Vict.; c. 34, 16 & 17 Vict.; 16 Halsb. Laws of England, 609; sub-sec. 4, English Finance Act of 1910; § 38, English Finance Act of 1894; *Drexel* v. *Commonwealth*, 46 Pa. St. 31, 40; *Stockdale* v. *Insurance Cos.*, 20 Wall. 323, 331, 341; *Income Tax Cases*, 148 Wisconsin, 456; Cooley on Taxation (3d ed.), pp. 492, 493, 494; *Locke* v. *New Orleans*, 4 Wall. 172; *Gray* v. *Darlington*, 15 Wall. 63, 66; *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Patton* v. *Brady*, 184 U. S. 608; *Flint* v. *Stone Tracy Co.*, *supra*, 108.

There is no invalid delegation of judicial authority to the Secretary of the Treasury. *Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 272; *Fong Yeu Ting* v. *United States*, 149 U. S. 698, 714; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 544; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660; *United States* v. *Duell*, 172 U. S.

576, 586; *Butterworth* v. *Hoe*, 112 U. S. 50, 67; *Runkle* v. *United States*, 122 U. S. 543, 557; *United States* v. *Ju Toy*, 198 U. S. 253; *Tang Tun* v. *Edsell*, 223 U. S. 673; *United States* v. *Sing Tuck*, 194 U. S. 161, 170; *Japanese Immigrant Case*, 189 U. S. 86, 98; *Turner* v. *Williams*, 194 U. S. 279; *Chin Bak Kan* v. *United States*, 186 U. S. 193; *Fok Yung Yo* v. *United States*, 185 U. S. 296; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320.

This act is separable by its own express provisions, and the entire statute could not fail even were there partial invalidity. Section 4, par. T, Act of Oct. 3, 1913, 38 Stat. 166 *et seq.;* Cooley on Const. Lim. (7th ed.), 246, 247, 250; *Field* v. *Clark*, 143 U. S. 649; *Huntington* v. *Worthen*, 120 U. S. 97.

There was no argument on behalf of appellee.

Mr. Chief Justice White delivered the opinion of the court.

As a stockholder of the Union Pacific Railroad Company the appellant filed his bill to enjoin the corporation from complying with the Income Tax provisions of the Tariff Act of October 3, 1913, (§ II, ch. 16, 38 Stat. 166). Because of constitutional questions duly arising the case is here on direct appeal from a decree sustaining a motion to dismiss because no ground for relief was stated.

The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong and multiplicity

of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of § 3224, Rev. Stat., against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes referred to is without merit. Before coming to dispose of the case on the merits, however, we observe that the defendant corporation having called the attention of the Government to the pendency of the cause and the nature of the controversy and its unwillingness to voluntarily refuse to comply with the act assailed, the United States as *amicus curiæ* has at bar been heard both orally and by brief for the purpose of sustaining the decree.

Aside from averments as to citizenship and residence, recitals as to the provisions of the statute and statements as to the business of the corporation contained in the first ten paragraphs of the bill advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that in a wide sense they all charge a repugnancy of the statute to the Sixteenth Amendment under the more immediate sanction of which the statute was adopted.

The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, how-

ever, that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is, a power to levy an income tax which although direct should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes "from whatever source derived," the exclusion from taxation of some income of designated persons and classes is not authorized and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax "incomes from whatever source derived" for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and preëxisting provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because so far as the retroactive period is concerned, it is governed by the preëxisting constitutional requirement as to apportionment.

But it clearly results that the proposition and the con-

tentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one State or States than was levied in another State or States. This result instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.

But let us by a demonstration of the error of the fundamental proposition as to the significance of the Amendment dispel the confusion necessarily arising from the arguments deduced from it. Before coming, however, to the text of the Amendment, to the end that its significance may be determined in the light of the previous legislative and judicial history of the subject with which the Amendment is concerned and with a knowledge of the conditions which presumptively led up to its adoption and hence of the purpose it was intended to accomplish, we make a brief statement on those subjects.

That the authority conferred upon Congress by § 8 of Article I "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never

been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of Art. I, § 8, cl. 1, that "all duties, imposts and excises shall be uniform throughout the United States," and to the limitations of Art. I, § 2, cl. 3, that "direct taxes shall be apportioned among the several States" and of Art. I, § 9, cl. 4, that "no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." In fact the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in *Pollock* v. *Farmers' Loan & Trust Company*, *supra*, at page 557: "In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises." It is to be observed, however, as long ago pointed out in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, that the requirement of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the Government down to the time of the adoption of the Sixteenth Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced

by neither, no question has been anywhere made as to the correctness of these propositions. At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. Without pausing to state at length the basis of these differences and the consequences which arose from them, as the whole subject was elaborately reviewed in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429; 158 U. S. 601, we make a condensed statement which is in substance taken from what was said in that case. Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages "for the conveyance of persons," and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. (*Hylton* v. *United States*, 3 Dall. 171.) It was held that the tax came within the class of excises, duties and imposts and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment because it was not levied directly on property because of its ownership but rather on its use and was therefore an excise, duty or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership. Putting out of view the difference of reasoning which led to the concurrent conclusion in the *Hylton Case*, it is undoubted that it came to pass in legislative practice that the line of demarcation between the two great classes of direct taxes on the one hand and excises, duties and

imposts on the other which was exemplified by the ruling in that case, was accepted and acted upon. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while no instance of apportionment as to any other kind of tax is afforded. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861 and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws were classed under the head of excises, duties and imposts because it was assumed that they were of that character inasmuch as although putting a tax burden on income of every kind, including that derived from property real or personal, they were not taxes directly on property because of its ownership. And this practical construction came in theory to be the accepted one since it was adopted without dissent by the most eminent of the textwriters. 1 Kent Com. 254, 256; 1 Story Const., § 955; Cooley Const. Lim. (5th ed.) * 480; Miller on the Constitution, 237; Pomeroy's Constitutional Law, § 281; Hare Const. Law, Vol. 1, 249, 250; Burroughs on Taxation, 502; Ordronaux, Constitutional Legislation, 225.

Upon the lapsing of a considerable period after the repeal of the income tax laws referred to, in 1894 an act was passed laying a tax on incomes from all classes of property and other sources of revenue which was not apportioned, and which therefore was of course assumed to come within the classification of excises, duties and imposts which were subject to the rule of uniformity but not to the rule of apportionment. The constitutional validity of this law was challenged on the ground that it did not fall within the class of excises, duties and imposts,

but was direct in the constitutional sense and was therefore void for want of apportionment, and that question came to this court and was passed upon in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601. The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover in addition the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class

of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the *Pollock Case* in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from "professions, trades, employments, or vocations" (158 U. S. 637), its validity was recognized; indeed it was expressly declared that no dispute was made upon that subject and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. *Id.*, p. 635. The whole law was however declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor," (*Id.*, p. 637) a result which it was held could not have been contemplated by Congress.

This is the text of the Amendment:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never ques-

tioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed in the light of the history which we have given and of the decision in the *Pollock Case* and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived,

forbids the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class. This must be unless it can be said that although the Constitution as a result of the Amendment in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the *Hylton Case* because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the *Pollock Case* that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes.

We come then to ascertain the merits of the many contentions made in the light of the Constitution as it now stands, that is to say, including within its terms the provisions of the Sixteenth Amendment as correctly interpreted. We first dispose of two propositions assailing the validity of the statute on the one hand because of its repugnancy to the Constitution in other respects, and especially because its enactment was not authorized by the Sixteenth Amendment.

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the Fifth Amendment and as inconsistent with the Sixteenth Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

"The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent. upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

The statute provides that the tax should not apply to enumerated organizations or corporations, such as labor, agricultural or horticultural organizations, mutual savings banks, etc., and the argument is that as the Amendment authorized a tax on incomes "from whatever source derived," by implication it excluded the power to make these exemptions. But this is only a form of expressing the erroneous contention as to the meaning of the Amendment, which we have already disposed of. And so far as this alleged illegality is based on other provisions of the Constitution, the contention is also not open, since it was expressly considered and disposed of in *Flint* v. *Stone Tracy Co.*, 220 U. S. 108, 173.

Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.

1. The statute levies one tax called a normal tax on all incomes of individuals up to $20,000 and from that amount up by gradations, a progressively increasing tax called an additional tax, is imposed. No tax, however, is levied upon incomes of unmarried individuals amounting to $3,000 or less nor upon incomes of married persons amounting to $4,000 or less. The progressive tax and the exempted amounts, it is said, are based on wealth alone and the tax is therefore repugnant to the due process clause of the Fifth Amendment.

2. The act provides for collecting the tax at the source, that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation, and we recapitulate various contentions as to discrimination against corporations and against individ-

uals predicated on provisions of the act dealing with the subject:

(a) Corporations indebted upon coupon and registered bonds are discriminated against, since corporations not so indebted are relieved of any labor or expense involved in deducting and paying the taxes of individuals on the income derived from bonds.

(b) Of the class of corporations indebted as above stated, the law further discriminates against those which have assumed the payment of taxes on their bonds, since although some or all of their bondholders may be exempt from taxation, the corporations have no means of ascertaining such fact, and it would therefore result that taxes would often be paid by such corporations when no taxes were owing by the individuals to the Government.

(c) The law discriminates against owners of corporate bonds in favor of individuals none of whose income is derived from such property, since bondholders are, during the interval between the deducting and the paying of the tax on their bonds, deprived of the use of the money so withheld.

(d) Again corporate bondholders are discriminated against because the law does not release them from payment of taxes on their bonds even after the taxes have been deducted by the corporation, and therefore if after deduction the corporation should fail, the bondholders would be compelled to pay the tax a second time.

(e) Owners of bonds the taxes on which have been assumed by the corporation are discriminated against because the payment of the taxes by the corporation does not relieve the bondholders of their duty to include the income from such bonds in making a return of all income, the result being a double payment of the taxes, labor and expense in applying for a refund, and a deprivation of the use of the sum of the taxes during the interval which elapses before they are refunded.

3. The provision limiting the amount of interest paid which may be deducted from gross income of corporations for the purpose of fixing the taxable income to interest on indebtedness not exceeding one-half the sum of bonded indebtedness and paid-up capital stock, is also charged to be wanting in due process because discriminating between different classes of corporations and individuals.

4. It is urged that want of due process results from the provision allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed and not giving such right of deduction to corporations.

5. Want of due process is also asserted to result from the fact that the act allows a deduction of $3,000 or $4,000 to those who pay the normal tax, that is, whose incomes are $20,000 or less, and does not allow the deduction to those whose incomes are greater than $20,000; that is, such persons are not allowed for the purpose of the additional or progressive tax a second right to deduct the $3,000 or $4,000 which they have already enjoyed. And a further violation of due process is based on the fact that for the purpose of the additional tax no second right to deduct dividends received from corporations is permitted.

6. In various forms of statement, want of due process, it is moreover insisted, arises from the provisions of the act allowing a deduction for the purpose of ascertaining the taxable income of stated amounts on the ground that the provisions discriminate between married and single people and discriminate between husbands and wives who are living together and those who are not.

7. Discrimination and want of due process results, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay rent are not allowed, in making up their taxable income, to deduct rent which they have

paid, and that want of due process also results from the fact that although family expenses are not as a rule permitted to be deducted from gross, to arrive at taxable, income, farmers are permitted to omit from their income return, certain products of the farm which are susceptible of use by them for sustaining their families during the year.

So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. *Knowlton* v. *Moore*, 178 U. S. 41; *Patton* v. *Brady*, 184 U. S. 608, 622; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158; *Billings* v. *United States*, 232 U. S. 608, 622.

So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat* v. *White*, 181 U. S. 264; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.*, *supra*; *Billings* v. *United States*, 232 U. S. 261, 282. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking

of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions. It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was imposed by Congress and that such authority was exerted in some if not all of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in *Knowlton* v. *Moore*, *supra*, and the right to urge it was necessarily foreclosed by the ruling in that case made. In this situation it is of course superfluous to say that arguments as to the expediency of levying such taxes or of the economic mistake or wrong involved in their imposition are beyond judicial cognizance. Besides this demonstration of the want of merit in the contention based upon the progressive feature of the tax, the error in the others is equally well established either by prior decisions or by the adequate bases for classification which are apparent on the face of the assailed provisions, that is, the distinction between individuals and corporations, the difference between various kinds of corporations, etc., etc. *Knowlton* v. *Moore*, *supra*; *Flint* v. *Stone Tracy Co.*, *supra*; *Billings* v. *United States*, *supra*; *National Bank* v. *Commonwealth*, 9 Wall. 353; *National Safe Deposit Co.* v. *Illinois*, 232 U. S. 58, 70. In fact, comprehensively surveying all the contentions

relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing.

We have not referred to a contention that because certain administrative powers to enforce the act were conferred by the statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320.

Affirmed.

FLEITMANN, SUING ON BEHALF OF STOCKHOLDERS OF THE CONSOLIDATED STREET LIGHTING COMPANY, *v.* WELSBACH STREET LIGHTING COMPANY.

SAME *v.* SHAW.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 145, 146. Argued December 17, 1915.—Decided January 24, 1916

When the penalty of triple damages is sought under § 7 of the Anti-Trust Act the liability can only be enforced through the verdict of a jury in a court of common law.

While under the Act of October 15, 1914, private parties can obtain an injunction against threatened loss, that act, in terms, goes no farther.

A suit in equity by a single stockholder of a corporation against that and other corporations to require the latter to pay to the former threefold damages under § 7 of the Sherman Act cannot be maintained, nor, in such a case, can there be a decree requiring the corporation of which plaintiff is a stockholder to sue the other corporations or permitting him to sue in its name and on its behalf.

211 Fed. Rep. 103, affirmed.

THE facts, which involve the right of a single stockholder to maintain a suit against the corporation under § 7 of the Sherman Act, are stated in the opinion.

Mr. Henry L. Scheuerman, with whom *Mr. Henry A. Wise* and *Mr. Harry F. Mela* were on the brief, for appellant.

Mr. Edward W. Hatch, with whom *Mr. William F. Sheehan* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill by a stockholder of the Consolidated Street Lighting Company, against that Company and a number

of other corporations and individuals, to compel the defendants other than his own company to pay to the latter threefold damages under the Sherman Act. July 2, 1890, c. 647, § 7; 26 Stat. 209, 210. According to the allegations the other defendants conspired to control the business of municipal lighting, &c. throughout the United States and in pursuance of their conspiracy procured their agent to purchase from the former owners a majority of the stock in the plaintiff's company, and then proceeded to ruin it and drive it out of business by misconducting its affairs. The plaintiff has demanded of his company and its officers to institute proceedings but they have refused. The bill was dismissed by the District Court on motion of the appellees in the two appeals before this court, and the decree was affirmed by the Circuit Court of Appeals. 211 Fed. Rep. 103. 128 C. C. A. 31.

The bill alleges in terms that it is brought to recover threefold the damages alleged; a decree for such damages was the relief prayed. The only specific error assigned on appeal to the Circuit Court of Appeals was holding that such a suit in equity could not be maintained by a single stockholder; that was the only question dealt with by the District Court and that was the ground of decision in the Circuit Court of Appeals. It really is the only question in the case.

Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged.

No doubt there are cases in which the nature of the

right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other. *Pollard* v. *Bailey*, 20 Wall. 520. Even the Act of October 15, 1914, c. 323, § 16, 38 Stat. 730, 737, passed since this suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss.

It now is suggested, evidently as an afterthought since the decision in the District Court, that there might be a decree directing the corporation to sue or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held.

Decree affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

MT. VERNON-WOODBERRY COTTON DUCK COMPANY *v.* ALABAMA INTERSTATE POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 200. Submitted January 10, 1916.—Decided January 24, 1916.

Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment by common law as well as under the statutes of Alabama within the meaning of Judicial Code, § 237.

The fact that the denial of a petition for writ of prohibition does not decide the merits of the principal suit is immaterial so far as finality of the judgment is concerned.

Where the state court has denied a petition for writ of prohibition, all the points urged exclusively under the state constitution must be taken to have been decided adversely to plaintiff in error and this court in such respect follows the state court.

To manufacture, supply and sell to the public, power produced by water as motive force, *held* in this case, following the judgment of the state court, to be a public use justifying the exercise of eminent domain, and the statute of Alabama providing for condemnation of property for water power purposes is not unconstitutional as taking property without due process of law.

186 Alabama, 622, affirmed.

THE facts, which involve the construction, application and constitutionality of statutes of Alabama providing for proceedings to condemn land and water powers, are stated in the opinion.

Mr. Hollins N. Randolph and *Mr. Edwin G. Baetjer*, for plaintiff in error.

Mr. Thomas W. Martin and *Mr. Ray Rushton* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a writ of prohibition to prevent the Probate Court of Tallapoosa County from taking

jurisdiction of condemnation proceedings instituted by the Alabama Interstate Power Company to take land, water and water rights belonging to the petitioner. An alternative writ was issued but the Supreme Court of the State ordered it to be quashed and the writ to be dismissed. 186 Alabama, 622. The grounds of the petition are that the statutes of Alabama do not authorize the proceedings and that if they do they contravene the Fourteenth Amendment of the Constitution of the United States. The Supreme Court upheld the statutes and the jurisdiction of the Probate Court, but left the sufficiency of the petition for condemnation, whether every subject of which condemnation was sought could be condemned, and the ability of the Power Company to prove its case, to be determined in the condemnation case. There is a motion to dismiss the writ of error on the ground that the present decision is not final because it does not determine the merits; but this motion must be denied. Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code, Act of March 3, 1911, c. 231, § 237, 36 Stat. 1087, 1156, under the statutes of Alabama and by the common law. Code of 1907, §§ 4864–4867, 4872. *Weston* v. *Charleston*, 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

The argument in favor of granting the writ presented by the plaintiffs in error, is addressed in great part to matters with which this court has no concern. It is argued that the Probate Court could not be given jurisdiction of the condemnation proceedings consistently with the constitution of the State; that under the same instrument the State Legislature had no power to pass the condemnation acts; that the petition was insufficient to found jurisdiction of the case and was defective in various

ways; that a part of the condemnation sought was bad under the statutes in any event; and that certain words in the Alabama Code under which it is sought to condemn rights below the contemplated dam of the Power Company, never were properly enacted by the legislature of the State. All these points must be taken to have been decided adversely to the plaintiff in error by the Supreme Court of Alabama so far as they might furnish grounds for prohibition, and they all are matters on which this court follows the Supreme Court of the State.

The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation and that for which it seeks to condemn property of the plaintiff in error is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. *Clark* v. *Nash*, 198 U. S. 361. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. The respect due to the judgment of the State would have great weight if there were a doubt. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607. *O'Neill* v. *Leamer*, 239 U. S. 244, 253. But there is none. See *Otis Co.* v. *Ludlow Manufacturing Co.*, 201 U. S. 140, 151. We perceive no ground for the distinction attempted between the taking of rights below the contemplated dam, such as these are, and those above. Compensation is provided for according to rules

that the court below declares to be well settled and that appear to be adequate. The details as to what may be taken and what not under the statutes and petition are not open here. Before a corporation can condemn rights it is required to have obtained, by other means, at least an acre on each side of the stream for a dam site, and this is supposed to show that the use is not public. It is only a reasonable precaution to insure good faith. A hardly consistent argument is that the dam should be built before the necessity of taking waters below can be shown. But a plan may show the necessity beforehand. All that we decide is that no general objection based on these grounds affects the jurisdiction of the Probate Court or the constitutionality of the act.

Certain exceptions from the powers conferred, such as private residences, lands of other corporations having similar powers, and cotton factories, subject to the taking of the excess of water over that in actual use or capable of use at normal stages of the stream, are too plainly reasonable so far as they come in question here to need justification. Discrimination is alleged but not argued. We see nothing that runs against the Fourteenth Amendment. The right given to take possession before the compensation is finally determined also is not argued. *Williams* v. *Parker*, 188 U. S. 491, 502. Without further discussion of the minutiæ, we are of opinion that the decision of the Supreme Court of Alabama upon the questions arising under the Constitution of the United States was correct.

Judgment affirmed.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* PENINSULA PRODUCE EXCHANGE OF MARYLAND.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 137. Argued December 15, 16, 1915.—Decided January 24, 1916.

The Carmack Amendment of June 29, 1906, extends to failure to transport with reasonable despatch; and under it there can be a recovery from the initial carrier for loss, damage or injury for such failure although on the line of the connecting carrier.

A subsequent legislative interpretation of a statute is entitled to great weight.

A condition of the tariff filed with the Interstate Commerce Commission that the carrier was not bound to transport on a particular train or vessel to arrive at a particular market or otherwise than with reasonable despatch does not relieve the carrier from liability under the Carmack Amendment for not delivering with reasonable despatch, although the delay may have been on line of connecting carrier.

In this case the state court did not deny to the carrier any Federal right in charging that the liability for unreasonable delay in delivering a carload of berries was the amount of the decline in value due to the delay at the place of destination, without stating the limitation in the filed tariff that the damages should not exceed the value at the time and place of shipment, the amount awarded being less than such value.

122 Maryland, 215, affirmed.

THE facts, which involve the construction and application of the Carmack Amendment to damages for delay, are stated in the opinion.

Mr. Henry Wolf Biklé and *Mr. Frederic D. McKenney* for plaintiff in error:

The Carmack Amendment does not impose upon the "initial carrier" liability for delay occurring on the line of its connection without physical damage to the property.

The plaintiff below is not entitled to recover because

its shipment failed to arrive in time for the market of May 28, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided that: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon."

In support of these contentions, see *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Almand* v. *Railroad*, 95 Georgia, 775; *A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173; *Balt. & Ohio R. R.* v. *United States*, 215 U. S. 481; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Byers* v. *Southern Exp. Co.*, 165 N. Car. 542; *Chi. & Alton R. R.* v. *Kirby*, 225 U. S. 155; *C., R. I. & P. Ry.* v. *Cramer*, 232 U. S. 490; *Detroit &c. Ry.* v. *McKenzie*, 43 Michigan, 609; *East Tenn. &c. Ry.* v. *Johnson*, 85 Georgia, 497; *Fort Smith &c. R. R.* v. *Awbrey*, 39 Oklahoma, 270; *Frey* v. *N. Y. Central R. R.*, 100 N. Y. Supp. 225; *G. H. & S. A. Ry.* v. *Wallace*, 223 U. S. 481; *Great Nor. Ry.* v. *O'Conner*, 232 U. S. 508; *Gulf &c. R. R.* v. *Nelson*, 139 S. W. Rep. 81; *Matter of Bills of Lading*, 14 I. C. C. 346; *Johnson* v. *M., K. & T. Ry.*, 95 N. Y. Supp. 182; *Kansas City So. Ry.* v. *Carl*, 227 U. S. 639; *Klass Commission Co.* v. *Wabash R. R.*, 80 Mo. App. 164; *Kramer & Co.* v. *C., M. & St. P. Ry.*, 101 Iowa, 178; *Leonard* v. *Railway Co.*, 54 Mo. App. 293; *M., K. & T. Ry.* v. *Carpenter*, 152 Tex. Civ. App. 585; *M., K. & T. Ry.* v. *Harriman*, 227 U. S. 657; *Myrick* v. *Mich. Cen. R. R.*, 107 U. S. 102; *Norfolk Truckers Exchange* v. *N. S. Ry. Co.*, 116 Virginia, 466; *Pecos &c. Ry.* v. *Coxe*, 150 S. W. Rep. 265; *Penna. R. R.* v. *Clark*, 118 Maryland, 514; *Penna R. R.* v. *Morrisdale Coal Co.*, 230 U. S. 304; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506; *Shaffer* v. *Chicago, R. I. & P. Ry.*, 21 I. C. C. 8; *Southern Pacific*

Co. v. *Lyon*, 66 So. Rep. 209; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 426; *Wabash R. R.* v. *Pearce*, 192 U. S. 179.

Mr. James E. Ellegood for defendant in error.

Mr. Justice Hughes delivered the opinion of the court.

On May 26, 1910, The Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The conditions of the transportation were set forth in the bill of lading issued by the railroad company. The property was delivered at destination some hours later than the customary time of arrival and this action was brought to recover damages for the failure to transport and deliver with reasonable despatch. Judgment in favor of the shipper was affirmed by the Court of Appeals of Maryland. 122 Maryland, 215.

The plaintiff in error, in its brief, states that "the questions involved are two,"—

"1. Does the Carmack Amendment impose on the 'initial carrier' liability for delay occurring on the line of its connection without physical damage to the property?

"2. Was the plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement endorsed hereon' ?"

The first question, arising from the fact that it did not appear that the delay occurred on the line of the initial

carrier (the defendant) was raised by an unsuccessful demurrer to the declaration, and both questions were presented by prayers for instructions which were denied.

The amendment of § 20 of the Interstate Commerce Act, known as the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595), provides "that any common carrier . . . receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed."

We need not review at length the considerations which led to the adoption of this amendment. These were stated in *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 199–203. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only "for loss, damage or delay" occurring on its own line. This "burdensome situation" was "the matter which Congress undertook to regulate." And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled "as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies," was within the power of Congress. The rule, said the court in defining the purpose of the Carmack Amendment, "is adapted to

secure the rights of the shipper by securing unity of transportation with unity of responsibility." And, again, we said in *Adams Express Company* v. *Croninger*, 226 U. S. 491, that this legislation embraces "the subject of the liability of the carrier under a bill of lading which he must issue."—"The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." *Id.*, p. 506.

It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words "any loss, damage, or injury to such property" caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury" and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of

the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility. Further, it is urged, that the amendment provides that the initial carrier may recover from the connecting carrier "on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property," and this, it is said, shows that the 'loss, damage, or injury' described is that which may be localized as having occurred on the line of one of the carriers and therefore should be limited to physical loss or injury. But we find no difficulty in this, as the damages required to be paid by the initial carrier are manifestly regarded as resulting from some breach of duty, and the purpose is simply to provide for a recovery against the connecting carrier if the latter, as to its part of the transportation, is found to be guilty of that breach. The view we have expressed finds support in the explicit terms of the act of January 20, 1914, c. 11, 38 Stat. 278, which provides "that no suit brought in any state court of competent jurisdiction against a railroad company . . . to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce . . . shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000." If the language of § 20 can be regarded as ambiguous, this legislative interpretation of it as conferring a right of action for delay, as well as for loss or injury to the property in the course of transportation is entitled to great weight.[1] *Alexander*

[1] The language of the Carmack Amendment has been construed in various decisions by state courts as embracing damages for delay. *Fort Smith R. R. Co.* v. *Awbrey*, 39 Oklahoma, 270; *Southern Pacific Co.* v. *Lyon* (Miss.), 66 So. Rep. 209; *Pecos Railway Co.* v. *Cox*, 150 S. W. Rep. (Texas) 265; *Norfolk Exchange* v. *Norfolk Southern R. R.*

v. *Mayor*, 5 Cranch, 1, 7, 8; *United States* v. *Freeman*, 3 How. 556, 564, 565; *Cope* v. *Cope*, 137 U. S. 682, 688.

The second question, as stated, is sought to be raised under the stipulation of the bill of lading (being one of the conditions filed with the tariffs under the Interstate Commerce Act) that the carrier is not bound to transport "by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch." See *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Atchison, Topeka & Santa Fe Rwy. Co.* v. *Robinson*, 233 U. S. 173. But the argument upon this point is not addressed to the issue, as recovery was not sought, or permitted, except for a failure to transport with reasonable despatch. The declaration alleged that the berries "were to be transported with safety, and with reasonable despatch, and delivered . . . in safe condition and with reasonable diligence"; that the defendant, or its connecting lines, did not "transport or deliver the same with reasonable despatch"; and that the damage was due to their failure to use "due and reasonable diligence." The court instructed the jury that it became the duty of the defendant and all connecting lines "to use reasonable care, diligence and exertion in forwarding and transporting and delivering" the berries, and that if the jury should believe that the defendant and the connecting lines, or any of them, "did not use such care, diligence and exertion" and that by reason of the failure so to do the berries arrived "too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence and exertion, and that the plaintiff thereby sustained loss, then their verdict should be for the plaintiff." As the Court of Appeals of Maryland said, the ground of the

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Co., 116 Virginia, 466. *Contra, Byers* v. *Southern Express Co.*, 165 N. Car. 542.

action was "the failure to carry with reasonable despatch and the loss of marketability is mentioned as the element of damage." That is, the reference to the market said to have been lost was merely for the purpose of calculating damages which were sought solely because of lack of reasonable diligence and not upon the allegation of any added duty with respect to a particular train or market. The stipulation invoked does not attempt to limit the duty of the carrier to transport with reasonable despatch, and we are not called upon to consider its effect in any other aspect.

The instructions, however, permitted the jury to award as damages the amount of the decline in value, due to the delay, at the place of destination, without stating the limitation set forth in the tariff of the plaintiff in error as filed; and this tariff with the accompanying conditions, duly offered in evidence, was excluded. It was conceded by the Court of Appeals that these rulings were erroneous, but the court found that they worked no harm to the plaintiff in error. The condition in the bill of lading, and in the filed tariff provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." Treating the rate charged for the transportation as based upon assent to this provision, the Court of Appeals construed the stipulation not as changing the basis of liability but as limiting the amount of the recovery in any event to the value of the property

at the time and place of shipment, no other value having been agreed upon. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Boston & Maine R. R. Co.* v. *Hooker*, 233 U. S. 97; *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278. It appeared from the evidence that the berries were sold in New York City at an average price of six and one-half cents a quart. It was also proved that the decline in value due to the delay was from two to three cents a quart. The jury gave a verdict for $180.48, which included $153.60, principal, and $26.88 interest. That is, the jury gave damages at the rate of two cents a quart for the 240 crates (7680 quarts) shipped. The court held that it could not be said, as the defendant contended, that there was no proof of actual damage from the delay; and that, so far as the maximum liability fixed by the filed tariff was concerned, the court was justified in taking the value of the berries at the time and place of shipment as being at least equal to the two cents a quart allowed. Upon this point the Court of Appeals said: "It may be judicially assumed that their value at the time and place of shipment was at least equal to the two cents per quart which the jury allowed as damages, and in the view we have taken of the case no just purpose would be served in reversing the judgment and subjecting the parties to the expense of a new trial." That is to say, upon the facts as the state court found them to be, the agreed maximum of liability as stipulated was not exceeded.

We cannot say, in the light of the evidence, that the state court denied to the plaintiff in error any Federal right in holding as it did with respect to the amount of the value of the berries at the time and place of shipment, and in this view we are unable to conclude that in disposing of the Federal questions there was any error which would require, or justify, a reversal.

Judgment affirmed.

LOOMIS *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 106. Argued December 6, 1915.—Decided January 24, 1916.

The purpose of the Act to Regulate Commerce was to secure and preserve uniformity, and the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission.

The character of equipment which the carrier must provide and allowances which it must make for instrumentalities supplied, and services rendered, by the shipper—such as inside doors and bulkheads in cars and timber therefor—are problems which directly concern rate making and are peculiarly administrative on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court.

The opinions of the Interstate Commerce Commission on questions in regard to allowances to shippers for doors and bulkheads indicate that these problems are complicated and administrative.

THE facts, which involve the construction and application of the Act to Regulate Commerce as amended by the Hepburn Act, are stated in the opinion.

Mr. Edward P. White, with whom *Mr. John Colmey* was on the brief, for plaintiff in error:

The judgment presents a Federal question, because it is founded upon an erroneous construction of certain Federal statutes, and upon nothing else.

It was the common-law duty of the defendant to furnish the lumber in suit.

The common-law duty asserted by the plaintiffs is reaffirmed by § 1 of the Interstate Commerce Act, the

liability of the defendant is necessarily implied by § 15, and the common-law remedy is expressly saved by § 22.

The common-law duty asserted in this action was enforceable at the place of shipment by the courts of New York, whatever the destination of the freight.

The alleged defense is without foundation.

The judgment under review, so far as it reverses part of the original judgment, should itself be reversed, in other respects it should be affirmed, and the original judgment should in all things be affirmed.

In support of the contentions, see *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122; *Cook* v. *Avery*, 147 U. S. 375, 384; *Chicago, M. & St. P. Ry.* v. *Solan*, 169 U. S. 133; *Cincinnati, N. O. & T. P. Ry.* v. *Fairbanks*, 90 Fed. Rep. 467, 471; *Commercial Bank* v. *Sloman*, 121 Am. Dec. 874; *Eastern Railway* v. *Littlefield*, 237 U. S. 140; *Farron* v. *Sherwood*, 17 N. Y. 227; *Galveston &c. R. R.* v. *Wallace*, 223 U. S. 481; *Goodale* v. *Lawrence*, 88 N. Y. 513; *Hanks* v. *Mo. Pac. Ry.*, 92 Nebraska, 594; *Hilton Lumber Co.* v. *Atlantic Coast Line*, 6 L. R. A. (N. S.) 225; Hutchinson on Carriers, § 497; *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514, 525; *Ill. Cent. R. R.* v. *Mulberry Coal Co.*, 238 U. S. 275; *Int. Comm. Com.* v. *Diffenbaugh*, 222 U. S. 42; *Louis. & Nash. R. R.* v. *Brewing Co.*, 223 U. S. 70; *Loomis* v. *Lehigh Valley R. R.*, 147 App. Div. 195; *S. C.*, 132 N. Y. Supp. 138; *No. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *Mo. Pac. Ry.* v. *Castle*, 224 U. S. 541; *Murdock* v. *Memphis*, 20 Wall. 590; *N. Y., N. H. & Hart. R. R.* v. *New York*, 165 U. S. 628; *Neass* v. *Mercer*, 15 Barb. 318; *Norton* v. *Coons*, 6 N. Y. 33, 40; *Nutt* v. *Knut*, 200 U. S. 12, 19; *Pearce* v. *Wabash R. R.*, 192 U. S. 179; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R.* v. *Knight*, 171 N. Y. 354; *S. C.*, 192 U. S. 21; *Railroad Co.* v. *Davis*, 159 Illinois, 53, 58; *Roberts* v. *Ely*, 113 N. Y.

128, 131; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

Mr. Lyman M. Bass, with whom *Mr. Daniel J. Kenefick* and *Mr. Thomas R. Wheeler* were on the brief, for defendant in error:

No question is presented for review to this court because the judgment of the Court of Appeals of New York State does not deny any right, privilege or immunity specially set up or claimed by the plaintiffs in error under any statute of the United States.

The courts of the State of New York had no jurisdiction over the interstate shipments involved since Congress had legislated upon the field covering such interstate transportation and had assumed exclusive jurisdiction thereof.

The courts of the State of New York have not jurisdiction to nor should this court direct that the defendant in error make a payment to the plaintiffs in error in violation of the specific provisions of the Interstate Commerce Act.

The Interstate Commerce Commission under the Interstate Commerce Act has the exclusive jurisdiction to determine whether or not the practice of the defendant in error was discriminatory and unjust in failing to provide in its tariffs for allowances to shippers for lumber furnished for grain doors or bulkheads and until the Interstate Commerce Commission had acted, no court, state or Federal, had any jurisdiction to require the railroad to pay shippers for such lumber so furnished.

Defendant after the passage of the Hepburn Act owed no common-law duty to furnish grain doors and bulkheads for interstate shipments without extra charge, and consequently there is no obligation on its part to reimburse the plaintiffs for lumber furnished by them for that purpose without its request unless provisions therefor were made in its tariffs.

In support of these contentions, see *Armour Packing Co.* v. *United States*, 209 U. S. 57, 72; *Atchison Ry.* v. *United States*, 232 U. S. 199; *Atlantic Coast Line* v. *Macon Grocery Co.*, 166 Fed. Rep. 206, aff'd 215 U. S. 501; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155; *Chicago & Rock Island Ry.* v. *Hardwick*, 226 U. S. 426; *Cincinnati &c. R. R.* v. *Slade*, 216 U. S. 78, 83; *Fowler* v. *Samson*, 164 U. S. 252; *Harding* v. *Illinois*, 196 U. S. 78, 84; *K. C. S. Ry.* v. *Albers Commission Co.*, 223 U. S. 573; *Loeb* v. *Trustees*, 179 U. S. 472, 481; *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247, 258–9; *McNeil* v. *Southern Ry.*, 202 U. S. 543; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *National Lumber Assn.* v. *Atlantic Coast Line*, 14 I. C. C. 154; *N. Y. & New Haven R. R.* v. *Int. Comm. Com.*, 200 U. S. 361, 391; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648; *Penna. R. R.* v. *Int. Mining Co.*, 230 U. S. 184; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R.* v. *Clark*, 238 U. S. 456; *Pierce Co.* v. *Wells, Fargo Co.*, 236 U. S. 278; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506; *Sayward* v. *Denny*, 158 U. S. 180; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Swearingen* v. *St. Louis*, 185 U. S. 38, 45; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 426; *Thomas* v. *Illinois*, 209 U. S. 258; *Victor Fuel Co.* v. *Atchison &c. Ry.*, 14 I. C. C. 119; *Zadig* v. *Baldwin*, 166 U. S. 485, 488.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending

May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in the car, which they loaded and delivered to defendant for transportation to points both within and beyond the State. The total cost of material used was $322.07—it varied from forty cents to three dollars and fifty cents per car.

Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a state court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. Defendant denied liability and further challenged the court's jurisdiction over claims incident to interstate shipments because: It was and remains an interstate carrier subject to the Act to Regulate Commerce as amended and supplemented as well as the act of Congress passed February 19, 1903, known as the Elkins Act, etc.; it had filed with the Interstate Commerce Commission the tariffs under which such shipments were made; these tariffs fixed rates for transportation only and did not provide for payments or allowances for grain doors, bulkheads, or lumber for

constructing the same; the rates were reasonable and just and had not been held otherwise by the Interstate Commerce Commission.

The Court of Appeals held that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors, or bulkheads for transporting grain or provisions in bulk and unless local or Federal statutes had established different rules plaintiffs were entitled to recover. Having considered the statutes, it concluded the local act created no bar to recovery on account of the intrastate shipments, but that Congress had assumed such control over interstate shipments as to deprive the state courts of power to consider claims arising out of them. 208 N. Y. 312. The judgment of the Appellate Division in favor of plaintiffs for total cost of material supplied by them was modified accordingly and the record and proceedings remitted to the Supreme Court, Ontario County. This writ of error was then sued out to obtain a review of the judgment of the Court of Appeals, being addressed to the Supreme Court because the record was in its possession. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556.

No serious dispute exists concerning the facts. The applicable duly-filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic, is the sole point demanding consideration.

The effect of the Act to Regulate Commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. *Tex. & Pac. Ry.* v. *Abilene Cotton Co.*, 204 U. S. 426; *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Balt. & Ohio R. R.*, 222 U. S. 506; *Mitchell*

Coal Co. v. *Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry.* v. *American Tie Co.*, 234 U. S. 138; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456.

Speaking through Mr. Justice Lamar in *Mitchell Coal Co.* v. *Penna. R. R.*, *supra*, we said (p. 255): "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

In the *Minnesota Rate Cases*, *supra*, we further said (p. 419): "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

And in *Tex. & Pac. Ry. Co.* v. *American Tie Co.*, *supra*, the rule was thus stated (p. 146): "It is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which

it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. R.* v. *Puritan Coal Co.*, *supra*, pp. 128, 129; *Penna. R. R.* v. *Clark Coal Co.*, *supra*, pp. 469, 470.

If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result, is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

On June 1, 1908, before this proceeding was begun, the Interstate Commerce Commission ruled: "A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff." (Conference Ruling No. 78.) In *National Lumber Ass'n* v. *Railroad*, 14 I. C. C. 154,

June 23, 1908, after much consideration, the Commission refused to order carriers either to furnish flat cars equipped in all respects for transporting lumber or grant allowances for cost incurred by shippers in connection therewith. In *N. Y. Shippers' Ass'n* v. *N. Y. Central R. R.*, 30 I. C. C. 437 (1914), the regulations and practices of railroads in Western New York with respect to car fittings used in bulk transportation of grain and produce, were challenged. The shippers claimed, "it is the carrier's duty to supply cars at all seasons of the year fully equipped for the safe transportation of grain, potatoes, and other produce in bulk without further fitting; or, that if a car be tendered the shipper which cannot safely be used for such commodities, in view of their nature or of the condition of the weather, it is the carrier's duty to furnish, or to pay for, all materials and labor necessary to render the car reasonably safe." This was denied. The opinions in these causes strikingly indicate the complicated administrative problem involved.

We find no error in the judgment below and it is

Affirmed.

KANSAS CITY WESTERN RAILWAY COMPANY *v.* McADOW.

ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 127. Submitted January 18, 1916.—Decided January 31, 1916.

If the declaration on which a case is tried brings it under the Employers' Liability Act, the fact that the particular allegation showing that plaintiff was engaged in interstate commerce appeared as an amendment does not raise a Federal question.

Actions of tort are transitory.

The law governing the situation in an action in a state court under the Employers' Liability Act is equally the law of the State whether derived from Congress or the state legislature and must be noticed by the court.

An electric railway from Leavenworth, Kansas, to Kansas City, Kansas, with a traffic agreement with a street railway company operating in Kansas City, Missouri, *held* to be a railroad within the Act to Regulate Commerce. *United States* v. *Balt. & Ohio S. W. R. R.*, 226 U. S. 14. *Omaha Street Ry.* v. *Int. Comm. Comm.*, 230 U. S. 324, distinguished.

The statute of Kansas is so similar to the Federal Employers' Liability Act that the liability of the employer is not affected by the question of which governs the case, and it is under such circumstances unnecessary to determine which law applies.

THE facts, which involve the validity of a verdict in an action for personal injuries and the application of the Federal Employers' Liability Act, are stated in the opinion.

Mr. Charles F. Hutchings and *Mr. McCabe Moore* for plaintiff in error.

Mr. John H. Atwood and *Mr. Oscar S. Hill* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by the defendant in error against the plaintiff in error in whose employ he was. The original petition alleged that the defendant operated a line of electric railway extending from Leavenworth, Kansas, through Wolcott and Kansas City in the same State into Kansas City, Missouri, that the plaintiff was a motorman upon a car on the line and was injured in Kansas by a collision due to the defendant's negligence. An amendment was allowed alleging that the

plaintiff was injured on a trip from Kansas City, Missouri, to Leavenworth, with further details, and that the defendant's negligent acts were in violation of the act of Congress controlling such matters when the parties were engaged in commerce among the States. The defendant was a Kansas corporation having an electric railway from Leavenworth into Kansas City, Kansas. It had a traffic agreement with the Metropolitan Street Railway Company operating street railways in Kansas City, Missouri, by which the latter was to receive the cars of the former carrying passengers and freight and move them through designated streets in Missouri and back to Kansas; each party to be liable for damage due to its negligence during this part of the transit, and the fares and freight money to be divided in certain proportions. By a later agreement the route was modified and it was provided that the defendant should pay the trainmen's wages during the movement in Missouri but that they should be under the exclusive control of the Metropolitan Company and as between said companies, should in all respects be regarded for the time being as its employés. There was evidence that in fact at the time of the accident the only control exercised by the Missouri Company was to put a conductor upon the car to receive the fares, that while in Missouri it received its orders from the Kansas side, and that the Company was in the hands of receivers who seem not to have recognized the contract. The plaintiff got a verdict which was sustained. The errors assigned are, in substance, that the amendment expressly bringing the case under the act of Congress ought not to have been allowed; that the act does not apply to electric roads and that, if it does, the defendant was not engaged in commerce among the States, or at least was not if the contract between the companies governed the movement of the car.

As to the first it would be enough to say that if the

declaration on which the case was tried brought it under the Act, the fact that it appeared as an amendment to one that alleged the same facts with the exception of the plaintiff's coming from beyond the State raises no question under the laws of the United States. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 513. *Brinkmeier* v. *Mo. Pac. Ry.*, 224 U. S. 268, 270. The state court sustained the amendment on the ground of waiver, but if it had held it allowable as a matter of course, no Federal right would have been infringed. *Wabash R. R.* v. *Hayes*, 234 U. S. 86, 90. It is said that by the amendment it gave a jurisdiction to the Missouri court that otherwise it would not have had under the Employers' Liability Act of April 5, 1910, c. 143; 36 Stat. 291. But actions of tort are transitory and the argument based on the act of 1910 would have no application unless the defendant was engaged in business governed by that act. The argument would be that if so engaged then, under the statute, the interstate road could not be sued in a state court unless it was doing business in that State. We express no assent to it, but if sound it would afford no ground for objecting to the amendment; and no question of jurisdiction was raised. The amendment introduced no fact inconsistent with those first alleged and it was unnecessary when the facts were stated to invoke the act of Congress in terms. The law governing the situation is equally the law of the State whether derived from Congress or the state legislature, and must be noticed by the courts. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42, 48. *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, 57.

The defendant's road appears to be of the class of the Traction Company that was before the court in *United States* v. *Baltimore & Ohio Southwestern R. R.*, 226 U. S. 14, and that was excepted from the decision in *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337. Such roads have been held

to be within the act of Congress. *Spokane & I. E. R. R.* v. *Campbell*, 217 Fed. Rep. 518. See Act of June 18, 1910, c. 309, § 12; 36 Stat. 539, 552. So again many cases have intimated that the technical considerations by which the defendant seeks to establish that it was not engaged in commerce among the States are not final. *Penna. R. R.* v. *Clark Brothers Mining Co.*, 238 U. S. 456, 467. *Savage* v. *Jones*, 225 U. S. 501, 520. *Swift* v. *United States*, 196 U. S. 375, 398. But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances it is unnecessary to decide which law applied. *Chicago & Northwestern Ry.* v. *Gray*, 237 U. S. 399.

Judgment affirmed.

GAST REALTY AND INVESTMENT COMPANY *v.* SCHNEIDER GRANITE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 211. Argued January 21, 1916.—Decided January 31, 1916.

The legislature may create taxing districts to meet the expense of local improvements without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse.

The law does not attempt an imaginary exactness or go beyond reasonable probabilities in establishing taxing districts.

A law establishing a taxing district under which there is no reasonable presumption that substantial justice will be done, but under which parties will probably be disproportionately taxed cannot stand as constitutional against one actually so taxed.

The ordinance of St. Louis authorized by the charter of that city levying part of the cost of paving on property fronting on the street but

based on area without providing for equal depth of the assessment district results necessarily, and not merely incidentally, in subjecting owners of property having greater depth than that adjoining them to greater and disproportionate taxation and is unconstitutional under the Fourteenth Amendment.

This decision is limited to the particular ordinance before the court and to those who, like the property owner in this case, have suffered from inequalities which have no justification in law.

259 Missouri, 153, reversed.

THE facts, which involve the construction and constitutionality under the Fourteenth Amendment of certain provisions in the charter and a street paving ordinance of the City of St. Louis, Missouri, are stated in the opinion.

Mr. Thomas G. Rutledge and *Mr. David Goldsmith*, with whom *Mr. Robert A. Holland, Jr.*, and *Mr. J. M. Lashly* were on the brief, for plaintiff in error.

Mr. Hickman P. Rodgers, with whom *Mr. William K. Koerner* were on the brief, for defendant in error:

The provisions under which this assessment was made are not repugnant to the Fourteenth Amendment. *Shumate* v. *Heman*, 181 U. S. 402; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324; *Schulte* v. *Heman*, 189 U. S. 507.

An assessment against all the ground within an improvement district will not be overthrown merely because one part of ground within the district may have received greater benefit from the improvement than another part; nor for the reason that the improvement does not adjoin or abut a particular piece of ground within such district. *Davidson* v. *New Orleans*, 96 U. S. 97; *Kelly* v. *Pittsburg*, 104 U. S. 78; *Hager* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Cleveland &c. R. R.* v. *Porter*, 210 U. S. 177, 184.

The question as to whether a particular piece of property is benefited by a local improvement and to what

extent is legislative, and not subject to judicial review. *Spencer* v. *Merchant, supra; Webster* v. *Fargo*, 181 U. S. 394; *French* v. *Barber Paving Co.*, 181 U. S. 324; *Chadwick* v. *Kelly*, 187 U. S. 540, 545; *Schaefer* v. *Woerling*, 188 U. S. 516.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to collect a tax for paving Broadway, a street in St. Louis, levied upon land of the defendants fronting upon that street. The plaintiff, defendant in error, did the work, received an assignment of the tax and got a judgment for the amount. The only question here is whether the ordinance levying the tax under the charter of the city is consistent with the Fourteenth Amendment of the Constitution of the United States. The charter provides that one-fourth of the total cost shall be levied upon all the property fronting upon or adjoining the improvement according to frontage and three-fourths according to area upon all the property in the district ascertained as follows: "A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. . . . If there is no parallel or converging street on either side of the street improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be

improved and at the average distance of the opposite district line so fixed and located." The defendants' land has a frontage on the west side of Broadway of 1083.88 feet out of a total in the district constituted said to be 4372 feet. It is an undivided tract extending back nearly a thousand feet to Church Road. On the south the adjoining property was divided into lots of small depth, and on the opposite side of Broadway the next parallel street was about 300 feet from Broadway. The ordinance establishing the taxing district treated Church Road as the next parallel street within the meaning of the charter, and included the defendants' tract to a depth of between four and five hundred feet, while the small lots next to it were included to only about 100 feet, the opposite lots to about 150 feet and another undivided tract on the east of Broadway, was included by average distance to a depth of 240 feet. The ordinance establishing these lines was held to follow the charter and to be consistent with the Fourteenth Amendment by the Supreme Court of the State. 259 Missouri, 153.

The legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse. *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness or go beyond the reasonable probabilities. *French* v. *Barber Asphalt Co.*, 181 U. S. 324. *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 397. So in the case of a square bounded by principal streets the land might be assessed half way back from the improvement to the next street. *Louis. & Nash. R. R.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430. But as is implied by *Houck* v. *Little River Drainage District* if the

law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact. *Martin* v. *District of Columbia*, 205 U. S. 135, 139.

The city of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, *Gilsonite Roofing Co.* v. *St. Louis Fair Association*, 231 Missouri, 589. *Granite Paving Co.* v. *Fleming*, 251 Missouri, 210. *Loth* v. *St. Louis*, 257 Missouri, 399. *Bush Construction Co.* v. *Withnell*, 185 Mo. App. 408. The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near five hundred feet when it encountered such a tract, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. The differences were not based upon any consideration of difference in the benefits conferred but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions not because of special considerations applicable to the parcels taxed but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual

exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts.

Judgment reversed.

By stipulation of counsel the same judgment will be entered in case No. 210.

MEMORANDUM ON PETITION FOR REHEARING, MARCH 20, 1916.

MR. JUSTICE HOLMES: Our decision is limited, of course, to the particular ordinance before the court; to the assessment of three quarters determined in the mode described, and to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law.

Motion for leave to file petition denied.

LAMAR *v.* UNITED STATES.[1]

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 434. Motion to dismiss or affirm submitted January 17, 1916.— Decided January 31, 1916.

Jurisdiction is a matter of power and covers wrong as well as right decisions.

The District Court has cognizance of all crimes cognizable under the authority of the United States and acts equally within its jurisdiction whether it decides that the accused is guilty or innocent and whether its decision is right or wrong.

The objection that an indictment does not charge a crime against the United States goes only to the merits of the case.

The question in what sense the word officer is used in § 32, Criminal Code, is not one involving the Constitution of the United States.

The same words may have different meanings as differently used, and

[1] For final decision of this case see 241 U. S. 103.

the word officer may be used in § 32 of the Criminal Code in a different sense from what it is used in the Constitution; and whether § 32 covers falsely personating a Congressman and whether a Congressman is a state or Federal officer are not constitutional questions which can be made the basis of a direct appeal under Jud. Code, § 241.

Under § 32, Crim. Code, the indictment is not for defrauding, but for false personation with intent to defraud, and the nature of the fraud is immaterial.

False personation by telephone of an officer of the United States takes effect where the hearer is, and whether the speaker is or is not in the same district where the former is, the District Court of that district has jurisdiction of the offense under § 32, Criminal Code.

THE facts, which involve the jurisdiction of the District Court of the crime of falsely personating an officer of the United States, to wit, a member of the House of Representatives, are stated in the opinion.

The Solicitor General for the United States, in support of the motion:

The court below had jurisdiction to construe the statute. Its error, if any, in so doing is one over which the Circuit Court of Appeals has exclusive appellate jurisdiction. The statute and not the Constitution was to be construed. No constitutional question is involved.

The alleged constitutional question, if presented, must be found in favor of the Government. A member of the House of Representatives is an officer of the Government of the United States and acting under its authority; members of Congress hold "office"; a member of Congress is an "officer." 2 Bouvier's Law Dict., p. 540, ed. of 1897; *Swafford* v. *Templeton*, 185 U. S. 487, 492; *Floyd Acceptances*, 7 Wall. 666, 676; *United States* v. *Maurice*, 2 Brock. 96, 102; Rev. Stat., §§ 1756, 1759, 1786, 2010; *Morril* v. *Haines*, 2 N. H. 246, 251; *Shelby* v. *Alcorn*, 36 Mississippi, 273, 291; *State* v. *Dillon*, 90 Missouri, 229, 233.

A member of Congress is a Federal and not a state officer. *Eversole* v. *Brown*, 21 Ky. Law Rep. 925, 927;

State v. *Gifford*, 22 Idaho, 613, 632, 633; *State* v. *Russell*, 10 Ohio Dec. 255, 264.

Other decisions of this court do not contravene the proposition here contended for.

In support of these contentions, see cases cited, *supra*, and also *Burton* v. *United States*, 202 U. S. 344; *Darnell* v. *Ill. Cent. R. R.*, 225 U. S. 243; *Empire State Mining Co.* v. *Hanley*, 205 U. S. 225; *Ex parte Yarbrough*, 110 U. S. 651; *Felix* v. *United States*, 186 Fed. Rep. 685; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Ill. Cent. R. R.* v. *Adams*, 180 U. S. 28; *Lamar* v. *Splain*, 42 App. D. C. 300; *Paddock Iron Co.* v. *Mason*, 2 S. W. Rep. 841; *Parks* v. *Soldiers' Home*, 22 Colorado, 86; *People* v. *Common Council*, 77 N. Y. 503; *People* v. *Hayes*, 7 How. Pr. (N. Y.) 248; *People* v. *Nostrand*, 46 N. Y. 375; *Smith* v. *McKay*, 161 U. S. 355; *State* v. *Hewitt*, 3 S. Dak. 187; *State* v. *Hocker*, 39 Florida, 477; *United States* v. *Barnow*, 239 U. S. 74; *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525; *Wiley* v. *Sinkler*, 179 U. S. 58; *Wise* v. *Withers*, 3 Cranch, 331; *Woods Case*, 2 Cowen (N. Y.), 30; *Adv. Op. to Governor*, 13 Florida, 692; *Adv. Op. to Governor*, 3 Maine, 481; 4 Birdseye's Consol. Laws N. Y., Ann., 1909, p. 4619; Black's Law Dict., p. 710, 2d ed.; Webster's Dictionary; Century Dictionary; Mechem on Public Officers, §§ 4, 19; Rawle on Const., 2d ed., 1829, pp. 213–218; 1 Rev. Stat. (N. Y.), 1829, p. 95.

Mr. Carl E. Whitney and *Mr. A. Leo Everett* for plaintiff in error in opposition to the motion:

The court had no jurisdiction of the cause, because the indictment did not charge any crime under the laws of the United States. The reasons are twofold (a) a Congressman is not an officer of the United States; (b) defendant was not charged with assuming to act "under

the authority of the United States," as the statute requires.

The Government, having failed to prove where the crime was committed, did not meet the constitutional provision that the accused shall be tried in the State and district where the crime was committed. Const. Amend., Art. VI.

In view of the failure to allege in the indictment the circumstances constituting the attempt to defraud, the defendant was deprived of his constitutional right to be informed of the nature and cause of the accusation against him. Const. Amend., Art. VI.

The construction of the Constitution was involved in the decision that a Congressman is an officer of the United States.

In support of these contentions, see *American Surety Co.* v. *Schulz*, 237 U. S. 159; Blackstone's Commentaries, Bk. 1, ch. 2, p. 159; *Blount's Case*, Wharton's St. Tr. 200; *Bogart* v. *So. Pac. Co.*, 228 U. S. 137; *Bryant Co.* v. *N. Y. Steamfitting Co.*, 235 U. S. 327; Burke's Works, Little, Brown & Co., 1866, vol. XI, p. 96; *Burton* v. *United States*, 202 U. S. 344; *Cohens* v. *Virginia*, 6 Wheat. 264; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Fore River Ship Building Co.* v. *Hagg*, 219 U. S. 175; *Grant Shoe Co.* v. *Laird*, 212 U. S. 445; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; *Greene* v. *Henkel*, 183 U. S. 249; *Healy* v. *Sea Gull Co.*, 237 U. S. 479; House Rep., No. 677, 63d Cong., 2d Sess.; House Res., 63d Cong., 2d Sess., Cong. Rec., p. 8831; *Hyde* v. *United States*, 225 U. S. 347; *The Jefferson*, 215 U. S. 130; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Mackenzie* v. *Hare*, 239 U. S. 299; *Mississippi R. R. Com.* v. *Louis. & Nash. R. R.*, 225 U. S. 272; *North Am. Storage Co.* v. *Chicago*, 211 U. S. 306; *Kelly* v. *Common Council*, 77 N. Y. 503; *Pettit* v. *Walshe*, 194 U. S. 205; *Steinfeld* v. *Leckendorf*, 239 U. S. 26; Story's Comm., 1st ed., § 791; Tucker on the Const., § 199; *United States* v.

Barnow, 239 U. S. 74; *United States* v. *Cook*, 17 Wall. 174; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Mills*, 7 Pet. 142; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was tried and convicted upon an indictment charging him with having falsely pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives, that is to say, A. Mitchell Palmer, a member of Congress, with intent to defraud J. P. Morgan & Company and the United States Steel Corporation. The case is brought here directly on the ground that the court had no jurisdiction because the indictment does not charge a crime against the United States, and that the interpretation of the Constitution was involved in the decision that a Congressman is an officer of the United States. There are subsidiary objections stated as constitutional that the indictment is insufficient and that it does not appear in what district the crime was committed.

On the matter of jurisdiction it is said that when the controversy concerns a subject limited by Federal law, such as bankruptcy, *Grant Shoe Co.* v. *Laird*, 212 U. S. 445; copyright, *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356; patents, *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, or admiralty, *The Jefferson*, 215 U. S. 130, the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the court. *The Ira M. Hedges*, 218 U. S. 264, 270. *Haddock* v. *Haddock*, 201 U. S. 562. Jurisdiction is a matter of power and covers wrong as well as right decisions. *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 235. *Burnet* v. *Desmornes*, 226 U. S. 145, 147. There may be instances in which it is

hard to say whether a law goes to the power or only to the duty of the court; but the argument is pressed too far. A decision that a patent is bad, either on the facts or on the law, is as binding as one that it is good. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. And nothing can be clearer than that the District Court, which has jurisdiction of all crimes cognizable under the authority of the United States (Judicial Code of March 3, 1911, c. 231, § 24, second), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

As to the construction of the Constitution being involved, it obviously is not. The question is in what sense the word 'officer' is used in the Criminal Code of March 4, 1909, c. 321, § 32. The same words may have different meanings in different parts of the same act and of course words may be used in a statute in a different sense from that in which they are used in the Constitution. *Am. Security & Trust Co.* v. *Dist. of Col.*, 224 U. S. 491, 494.

There were fainter suggestions that the defendant's constitutional rights were infringed because the nature of the fraud intended was not set forth and because the State and district wherein the crime was committed were not proved. The indictment is not for defrauding but for personation with intent to defraud; the nature of the fraud intended is not material and even might not yet have been determined. It is not an indictment for a conspiracy to commit an offence against the United States, where the offence intended must be shown to be a substantive crime. It reasonably may be inferred from the evidence that the defendant was tried in the right State and district in fact. If so, his constitutional rights were preserved. The personation was by telephone to a person

in New York (Southern District) and it might be found that the speaker also was in the Southern District; but if not, at all events the personation took effect there. *Burton* v. *United States*, 202 U. S. 344, 389. These objections are frivolous and the others have been shown to be unfounded. It follows that the writ of error must be dismissed.

Writ of error dismissed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SKAGGS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 194. Argued January 19, 20, 1916.—Decided January 31, 1916.

Where two employees of the carrier are necessarily working together, as under the exigencies existing in this case, each has a reasonable latitude in relying upon statements of the other made in the course of and as a part of the operation, and if statements made negligently by one result in injury of the other properly relying thereon, the latter is not barred from recovering under the Employers' Liability Act.

The salutary rule, that a party is not entitled to sit silent until after verdict, and then insist that it shall be set aside because the trial court failed to particularly specify in its charge some matter to which its attention had not been suitably called, has not been altered by the local statute of Minnesota under which errors in rulings and instructions may be specified on a motion for new trial without taking exceptions on the trial.

This court concurs in the view expressed by the state Appellate Court to the effect that an instruction on the question of contributory

negligence of the plaintiff did not conform exactly to the proper interpretation of the Employers' Liability Act, but that as the mistake was a verbal one which would undoubtedly have been corrected had attention been called thereto at the time, which was not done, and as defendant was not prejudiced thereby, it was not error justifying reversal of the judgment.

125 Minnesota, 532, affirmed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act, and the validity of a verdict and judgment recovered thereunder in a state court, are stated in the opinion.

Mr. W. S. Horton, with whom *Mr. Blewett Lee* was on the brief, for plaintiff in error.

Mr. Humphrey Barton, with whom *Mr. John H. Kay* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment recovered under the Federal Employers' Liability Act. There is no question but that the defendant in error, Fulton M. Skaggs, was injured while he was engaged in interstate commerce in the course of his employment by the plaintiff in error. It is contended that the state court erred in its application of the statute to the facts, both with respect to the conditions of liability and the measure of damages.

Skaggs had been employed by the Company for about four years, first in connection with the building and repair of bridges, and then, for about two years, as a locomotive fireman. A few days before the accident he began work as a brakeman on a freight train, his first run being from Freeport to Clinton, Illinois, on January 10, 1913. It was on the return trip to Freeport, on January 13, 1913, that he was injured. The crew consisted of the conductor, the engineer, the fireman, the rear brakeman, named Buchta,

and Skaggs who was head (or forward) brakeman. There was evidence that Buchta was assigned to the position of rear breakman because of his greater experience. The train reached Amboy, an intermediate station, about two o'clock A. M. It was a dark, cold night. There were fifteen cars in the train, two of which were to be left at Amboy. The train was cut immediately behind these two cars; the engine with the forward string of cars proceeded northward on the main track to a point beyond a switch connecting with a passing track to the west; and the two cars were then pushed back on the passing track and cut off. The engine with the remaining cars then returned to the main track and backed down in the direction of the cars which had been left standing on that track. After backing a short distance, the engine was stopped, was uncoupled, and was moved forward alone across the switch leading to the passing track, the purpose being to return to the passing track and from thence to proceed to a further track to the west in order to pick up certain other cars which were to be put into the train. There had not been left, however, a safe clearance for the engine, and, when the engine backed to the passing track, Skaggs who was riding on the right side at the rear of the tender was hit by the end of the foremost car left on the main track, was knocked to the ground and was run over, this being the injury of which he complains.

While there is little or no dispute as to these facts, there is a conflict of testimony as to the relation of Buchta, the other brakeman, to the occurrence. Omitting various details of the movements which for the present purpose need not be considered, and taking the testimony of Skaggs which the jury was at liberty to believe, these facts appear: When, after leaving the two cars on the passing track, the engine with the remaining string of cars returned to the main track and backed down, Skaggs gave the signal to stop, repeating a signal which was received, as he

supposed, from the conductor. At that time Buchta was somewhere in the yard (he had been lining up switches for the intended movements) but Skaggs did not see him when the cars were stopped. Skaggs then went to the depot to ascertain the meaning of the signal and was told by the conductor that it was necessary to pick up certain other cars. Returning to the engine, he attempted to uncouple it from the right-hand side but found this difficult, and Buchta who was then on the opposite side effected the uncoupling and said "Go ahead." On Skaggs' signal, the engine started forward; but Skaggs did not know whether the cars were left so as to give sufficient clearance for an engine going into the passing track and asked Buchta as to this. He did not receive a satisfactory answer; he stopped the engine, got off, and again asked Buchta who replied: "They are clear a mile, go ahead, and if we don't get out of here the sixteen-hour law will catch us before we get into Freeport." Skaggs at that time was on the track at the rear of the tender and not more than a car's length from the standing car. He then got on the engine, rode up to the switch, threw the switch, gave the back-up signal, stepped on the corner of the tender and was looking back for any signal that might be given by the other brakeman when he was caught between the rear right-hand side of the tender and the end of the standing car, as already stated.

It is contended that the state court erred in permitting a recovery under the Federal statute for the reason that the injury resulted from Skaggs' own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or

by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat. 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury the statute expressly provides that it "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." See *Second Employers' Liability Cases*, 223 U. S. 1, 49, 50; *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, 501. We think that the argument for the plaintiff in error overlooks the inferences of fact which the jury was entitled to draw. Thus, the jury could properly regard the two brakemen as assisting each other in the movement in question. Such assistance was certainly appropriate, if not absolutely necessary. The very purpose of having two brakemen was not to put upon either the entire responsibility. Working together under the exigencies of such operations, particularly when conducted in the night time, it was manifestly contemplated that the one brakeman would supplement the other and not be compelled at the peril of his rights personally to examine what the other did or the basis of the reports the other gave. Each had a reasonable latitude in relying upon the statements of the other made in the course of the operation and as a part of it. The Supreme Court of the State said: "It was

a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto." In this we find no error. When the engine was uncoupled, Skaggs was on the right-hand side, while Buchta was on the other side,—the side of the passing track—a better place to judge the clearance. The fact that Skaggs asked his questions is itself not without significance. These questions indicated doubt on Skaggs' part, while Buchta's reply showed certainty on his. It was plainly permissible to infer from the testimony that the two men were not in positions of equal advantage, and Skaggs was entitled to the exercise of reasonable care on the part of Buchta in observing and reporting the position of the cars. As there was evidence upon which it could be found that Buchta was negligent, and that thereby injury resulted to Skaggs, it cannot be said that the recovery in this aspect of the case was contrary to the statute.

But it is urged that the trial court erred in its instructions to the jury. After stating that if any employee "was at the time of this accident negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant . . . would be liable for that negligence," and after referring to the "direct conflict of testimony" with respect to what was said and done by Buchta, the trial court charged as follows: "Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company. You must determine this question of fact from all of

the testimony in the case." It was added, in substance, that if Buchta did not fail to exercise reasonable care the plaintiff was not entitled to recover. It is contended that the trial court erred in failing to qualify the instruction quoted, and other statements to the same effect, by reference to what Skaggs himself did, knew, or was in a position to know. But in view of the state of the testimony, and the point to which the court's instruction was addressed, we cannot say that it was in itself erroneous. If the plaintiff in error desired any addition, amplification or qualification in order to present its point of view to the jury it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the court to the jury or that it made any request whatever for instructions. While under the local statute (General Statutes, Minnesota, § 7830), the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called. *State* v. *Zempel*, 103 Minnesota, 428, 429; *Waligora* v. *St. Paul Foundry Co.*, 107 Minnesota, 554, 559; *Sassen* v. *Haegle*, 125 Minnesota, 441; *State* v. *Sailor*, 153 N. W. Rep. (Minn.) 271; *Smith* v. *Great Northern Ry. Co.*, 153 N. W. Rep. (Minn.) 513. This, also, is a sufficient answer to the complaint of the failure of the trial court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point. So far as these criticisms are concerned, we are unable to say that any asserted Federal right was denied by the state court.

The remaining question is with respect to the instructions of the trial court on the subject of contributory negligence. In the course of these the court fell into the error of saying that, if Skaggs was negligent, "a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you" (the jury); and, again, that the jury should "take into consideration his negligence in comparison with the negligence of the defendant." But the court read the applicable provision of the statute to the jury and also said: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame." And no request was made for a correction of the first-mentioned parts of the charge. It was recognized by the Supreme Court of the State that those parts failed to conform to the correct interpretation of the statutory rule as defined in *Norfolk & Western Rwy.* v. *Earnest*, 229 U. S. 114, 122, and the court quoted what we there said, as follows; "But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as com-

pared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. . . . Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

The state court concluded that 'upon the whole instruction no prejudice to defendant resulted.' And in this view we concur.

Judgment affirmed.

FRANK CROCKER, TRUSTEE IN BANKRUPTCY OF POSTAL SERVICE AND LOCK COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 77. Argued December 1, 2, 1915.—Decided January 31, 1916.

The findings of the Court of Claims in an action at law determine all matters of fact precisely as a verdict of a jury, and this court cannot refer to the opinion for the purpose of eking out, controlling or modifying their scope.

Secret arrangements with government officials by which they share in profits on contracts which they have a voice in awarding are most reprehensible, and vitiate the contract, justifying its rescission, even if made by those negotiating the contract on behalf of the contractor and without the actual knowledge of the latter.

No recovery can be had upon a government contract tainted with fraud and rescinded by the proper officer of the Government on that ground.

The rescission of a government contract to supply articles at a specified price is not an obstacle to a recovery upon a *quantum valebat*, if there was requisite proof of the value of the articles delivered.

Where there is fraud in obtaining the contract, the contract price of the articles cannot for the *quantum valebat* be regarded as an admission by the Government of the value of the articles delivered prior to the discovery of the fraud and rescission of the contract.

The burden of proof to establish value upon a *quantum valebat* for articles delivered under a contract rescinded for fraud is on the claimant; and if the Court of Claims made no finding of value in that respect and stated in explanation there was complete absence of evidence there can be no recovery. In this instance, the case will not be remanded for findings on the question of value.

49 Ct. Cl. 85, affirmed.

THE facts, which involve a claim against the United States for letter carriers' satchels and the effect of fraud on the right of the contractor to recover therefor, are stated in the opinion.

Mr. James H. Hayden, with whom *Mr. Robert C. Hayden* was on the brief, for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a claim for furnishing letter carriers' satchels under a contract with the Postmaster General. The contractor was a New Jersey corporation and its trustee in bankruptcy is the present claimant. In the Court of Claims a small part of the claim was sustained and the balance rejected. 49 Ct. Cls. 85. Only the claimant appeals, so the part sustained is not here in controversy.

As shown by the findings the facts are these: By public advertisement in May, 1902, the Postmaster General solicited bids for furnishing letter carriers' satchels for the free delivery service for a period of four years. Shortly after the advertisement the New Jersey company and one Lorenz entered into a written agreement whereby the company employed him to assist in securing for it the contract for furnishing the satchels, it being particularly stipulated that he and the company's vice-president, one Crawford, should determine the bid to be made and should present it in the company's name; that, if the company got the contract, Lorenz should receive all profits arising out of the same in excess of twenty-five cents on each satchel, and that, if the company did not get the contract, he was to accept one dollar as full payment for his services. Lorenz and Crawford then entered into a secret arrangement with one Machen, who was superintendent of the free delivery service and charged with important duties relating to the purchase of the satchels, whereby, in the event the company got the contract, Lorenz's share of the profits was to be divided among them on the basis of one-half to Machen and one-fourth to each of the others. After this arrangement was made a bid for the satchels was prepared and submitted in the company's name, and was accepted by the Postmaster General. The contract sued upon followed in regular course, the company agreeing therein to furnish the satchels in such quantities and at such times as the post office authorities might direct. The satchels were to be of three classes, those of classes A and C to have shoulder straps and those of class B to be without straps. The prices to be paid by the Government were $2.19 for each satchel of class A; $3.16 for each of class B, and $3.15 for each of class C. This included the shoulder straps on those of classes A and C. The company was not a manufacturer of satchels or of the materials used in making them, and to enable it to comply with

the contract it arranged, through Crawford, to have the satchels made by a manufacturer at Hartford, Conn. But, as the manufacturer could not supply shoulder straps of the type required, the company and Lorenz entered into a further agreement to the effect that Lorenz should supply the shoulder straps, that out of what was paid by the Government for the satchels the company should pay him 45 cents on each satchel of class A, $1.19 on each of class B and 84 cents on each of class C as his share of the profits and to reimburse him for supplying the straps. Crawford and Machen had conferred about the straps and Machen had said that the Government would get the straps, pay for them, send them to the company's manufacturer and adjust any difference afterwards.

Thereafter and prior to March 17, 1903, the company furnished over 10,000 satchels pursuant to the terms of the contract, save that the shoulder straps on those of classes A and C, which were in excess of 5,000, were provided and paid for by the Government, through Machen, at a cost of 39½ cents each. These satchels were all paid for by the Government, through Machen, at the contract rates without any deduction for the straps. Out of the moneys so received the company paid Lorenz 45 cents on each satchel of class A, $1.19 on each of class B and 84 cents on each of class C, and he in turn divided what he received with Machen and Crawford.

Between March 17 and April 30, 1903, the company furnished 6,201 more satchels pursuant to the terms of the contract, save that the shoulder straps on those of classes A and C, of which there were 4,912, were provided and paid for by the Government, through Machen, at a cost of 39½ cents each. These satchels were accepted and retained by the post office authorities. But when payment for them under the contract was requested, it was refused. This was because the Postmaster General had then learned of the corrupt arrangement giving

Machen an interest in the profits and had rescinded the contract and stopped further payments under it.

No shoulder straps were furnished by the company, through Lorenz or otherwise, and both he and Crawford knew that the straps were purchased and supplied by the Government. Before the rescission by the Postmaster General the company did not know that Machen was to share or was sharing in the profits, or that the Government was supplying the shoulder straps, save as the company may have been chargeable with the knowledge of Lorenz and Crawford who represented it in securing and executing the contract.

It was for furnishing the 6,201 satchels after March 17, 1903, that a recovery was sought in the Court of Claims and the part of the claim rejected was for the 4,912 satchels of classes A and C, the rejection being put on the grounds (a) that no recovery could be had upon the contract, because it called for satchels with shoulder straps and the company did not furnish the straps, and (b) that no recovery could be had upon a *quantum valebat*, because the value of the satchels as furnished was not shown.

In the briefs reference is made to portions of the opinion delivered in the Court of Claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in *Stone* v. *United States*, 164 U. S. 380, 382, 383, that "the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury," and that "we are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings." See also *Collier* v. *United States*, 173 U. S. 79, 80; *United States* v. *New York Indians*, 173 U. S. 464, 470.

We are of opinion that in the transactions out of which the claim arose there was an obvious departure from recognized legal and moral standards. It began when the company employed Lorenz, upon a compensation contin-

gent upon success, to secure the contract for furnishing the satchels, and it persisted until its discovery by the Postmaster General led to the rescission of the contract. Because of their baneful tendency, as here illustrated, agreements like that under which Lorenz was employed are deemed inconsistent with sound morals and public policy and therefore invalid. Dealing with such an agreement this court said in *Tool Co.* v. *Norris*, 2 Wall. 45, 54–55: "All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. . . . Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements." Further recognition of this rule is found in *Marshall* v. *Balt. & Ohio R. R.*, 16 How. 314,

334, 335; *Trist* v. *Child*, 21 Wall. 441; *Meguire* v. *Corwine*, 101 U. S. 108; *Oscanyon* v. *Arms Co.*, 103 U. S. 261, 273; *Sage* v. *Hampe*, 235 U. S. 99, 105.

The secret arrangement whereby Machen was to share in the profits was most reprehensible. Its natural effect, as also its purpose, was to secure for the company an inadmissible advantage. The satchels were wanted for the free delivery service and Machen's relation to that service made it probable, if not certain, that his advice respecting the reasonableness of the bid, the number of satchels required from time to time, and the company's performance of the contract, would be sought and given consideration by his superiors in the Post Office Department. The advertisement for bids, the postal regulations (ed. 1902, §§ 17 and 70) and the findings leave no doubt that he was charged with important duties of that character. Public policy and sound morals forbade that he should have any personal interest in the bid or contract lest he might be tempted to advance that interest at the expense of the Government. Under the secret arrangement, which was made before the bid was submitted, he had such an interest and therefore was in a position where the hope of personal gain was likely to exercise a predominant influence and prevent a faithful discharge of his public duties, as in fact it did. Referring to this arrangement, this court said in *Crawford* v. *United States*, 212 U. S. 183, 192: "Its almost necessary result, if carried out, would be to defraud the United States. The fraud might be perpetrated by getting the contract at a higher price than otherwise would have been obtained, or, if already obtained, then the United States might be defrauded by the General Superintendent [Machen] accepting improper satchels, not made of the materials, or in the manner specified in the contract, or by his requiring the delivery of more satchels than were sufficient for the wants of the department. . . . Such a corrupt agreement, if

carried out, would naturally, if not necessarily, result in defrauding the United States by causing it to pay more for satchels than was necessary, or for more satchels, or possibly inferior ones, than it otherwise would, but for the corrupt agreement set forth."

Of course, the secret arrangement with Machen operated to vitiate the company's contract and justified the Postmaster General in rescinding it on discovering the fraud. *Wardell* v. *Un. Pac. R. R.*, 103 U. S. 651, 658; *Thomas* v. *Brownville &c. R. R.*, 109 U. S. 522, 524; *McGourkey* v. *Toledo & Ohio Central R. R.*, 146 U. S. 536, 552, 565; *Smith* v. *Sorby*, L. R. 3 Q. B. Div. 552; *Harrington* v. *Victoria Graving Dock Co.*, *ibid.* 549; 2 Dillon Municipal Corporations, 5th ed., § 773. And this is so, even though the company was without actual knowledge of the corrupt arrangement. It was made by Lorenz and Crawford while endeavoring to secure the contract for the company and was a means to that end. They were the company's agents and were securing the contract at its request. It accepted the fruits of their efforts and thereby sanctioned what they did and made their knowledge its own. *Krumm* v. *Beach*, 96 N. Y. 398, 404; *Fairchild* v. *McMahon*, 139 N. Y. 290; *White* v. *Sawyer*, 16 Gray, 586, 589; *First National Bank* v. *New Milford*, 36 Connecticut, 93, 101; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259, 265; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 410, *et seq.*; Leake on Contracts, 6th ed., 255, 335–336; Wald's Pollock on Contracts, 3d ed. 392.

It results that no recovery could be had upon the contract with the Postmaster General, because it was tainted with fraud and rescinded by him on that ground. But this was not an obstacle to a recovery upon a *quantum valebat*. *Clark* v. *United States*, 95 U. S. 539, 543; *Wardell* v. *Un. Pac. R. R.*, *supra*, p. 659; *Thomas* v. *Brownville &c. R. R.*, *supra*, p. 525. Whether requisite proof was made of the value of the satchels as furnished is another

question. The Court of Claims made no finding of their value and, in explanation of this, said that there was "a complete absence" of evidence upon the subject. The burden of proof was with the claimant and, if he failed to carry it, he is not in a position to complain—especially as it appears that the Government seasonably objected that he had not proved the value. He insists, however, that the findings show the price at which the Government contracted to take the satchels with the shoulder straps and also what it cost the Government to supply the straps and that the difference should be regarded, in the absence of other evidence, as representing the value of the satchels as furnished, that is, without the straps. The insistence proceeds upon the theory that the contract price was in the nature of an admission by the Government of the value of the satchels with the straps. However this might be in other circumstances, it is wholly inadmissible here, for the fraud with which the contract was tainted completely discredited the contract price and prevented it from being treated as an admission of the value by the Government. It therefore was incumbent upon the claimant to show the value by other evidence and, as this was not done, no recovery could be had upon a *quantum valebat.*

Judgment affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent, being of opinion that the case should be remanded for findings on the question of value.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

CARDONA *v.* QUIÑONES.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

No. 185. Submitted January 18, 1916.—Decided February 21, 1916.

Where the appeal is prayed within the statutory time, the mere date of its allowance by the court is not controlling. *United States* v. *Vigil*, 10 Wall. 423.

Where the record in an appeal from the Supreme Court of Porto Rico contains a statement of fact prepared by the court below, and there is an entire absence of evidence, except as contained in such statement and the opinion, this court can only dispose of the legal propositions in the light of the facts as so shown and elucidated.

It is the settled doctrine of the court not to disturb but, in the absence of clear error, to uphold, the action of the court below as to matters concerning purely local law.

Both courts below having, in an action to recover real estate in Porto Rico, upheld the ten year prescription under the code, and also having found that appellant was not a third person entitled as such to the benefits of the recording provisions of the Mortgage Law, this court affirms the judgment.

20 Porto Rico, 421, affirmed.

THE facts, which involve the jurisdiction and practice of this court in appeals from judgments of the Supreme Court of Porto Rico and the validity of a judgment of that court, are stated in the opinion.

Mr. Jose R. F. Savage for appellant.

Mr. Francis H. Dexter for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Both courts below rejected the claim of title made by the appellant to a tract of land of 40 cuerdas. As the

appeal was prayed within the statutory time, the mere date of its allowance by the court is not controlling and the motion to dismiss which proceeds upon a contrary assumption is therefore without foundation and is overruled. *United States* v. *Vigil*, 10 Wall. 423, 427.

Obviously upon the theory that our power to review was controlled by the rule obtaining as to territorial courts of the United States this record, as was the case in *Elzaburu* v. *Chavez*, 239 U. S. 283, contains a statement of facts prepared by the lower court for the purposes of this appeal. As there is an entire absence from the record of the oral and documentary evidence upon which the court below acted except so far as the same may be shown by the opinion of the court or may be contained in the statement of facts, it follows that the record does not enable us to review the facts and we proceed to dispose of the legal propositions urged for reversal in the light of the facts as stated and as elucidated in the opinion of the court. Abbreviating and somewhat changing the order in which they are stated below, we recapitulate the essential facts as follows:

Two brothers, José Salvador Suris and Ramón María Suris, having acquired by various acts of purchase seventy cuerdas of land in the ward of Sabana Eneas of San Germán, in November, 1870, executed a mortgage on 40 cuerdas of the land thus acquired, being the 40 cuerdas here in controversy, in favor of the Charity Hospital at San Germán. In 1879 the Charity Hospital commenced proceedings to foreclose this mortgage, but such proceedings were stayed until 1882 in consequence of an appeal taken to the Territorial Audiencia. After the cessation of the stay, in that year an attachment against 100 cuerdas of land belonging to the two brothers was levied and the property thus attached was placed (sequestered) in the hands of one Pablo María Stefani. On the same day,

February 9, 1882, by a contract under private signature the two Suris brothers sold to Stefani the 40 cuerdas here in controversy which had been mortgaged to the hospital, the purchaser obligating himself to pay the hospital debt and, if a surplus remained, to pay certain attorney's fees which had been incurred. The agreement also contained a conveyance to Stefani of another and distinct tract of land for another and distinct price. This agreement under private signature was never inscribed upon the public records. A few days after it was made and presumably before the contract of sale had been carried out, the Suris brothers executed before a notary an act of consolidation of the various properties which they had acquired which they described as "Perseguida" and this act was put upon the public records. Under the private agreement Stefani the purchaser went into possession and discharged the obligations of the private contract of sale.

In 1888 a commercial firm, Schulze & Company, as creditors of the Succession of Stefani, who had in the meanwhile died, brought suit against his Succession to enforce its debt, and for the purpose of getting upon the records the possessory title of Stefani to enable an attachment to be levied, instituted and carried out the necessary proceedings. When the order for record was obtained the property was levied upon and sold at a judicial sale and was bought in by Schulze & Company. After thus becoming the purchasers of the land in controversy, the firm in 1899 executed before a notary and put of record a deed consolidating into a plantation called Imisa various tracts of land containing 192.30 cuerdas, the deed reciting that one of the parcels of land included in the plantation was a tract of 40 cuerdas called "Hospital" or "Perseguida." Ramón María Suris, one of the original vendors, died in the meanwhile, and in 1900 his heirs put upon record a declaratory deed asserting their undivided owner-

ship as the successors of their father to a tract of 40 cuerdas known as Perseguida.

The Bank of Porto Rico as the holder of a mortgage put upon the Imisa plantation by Schulze & Company, foreclosed the same and bought in the property in August, 1905, and in November of the following year (1906) the bank sold the plantation thus acquired to Francisco P. Quiñones, the defendant, his title as purchaser having been inscribed upon the public records.

In 1907 José Salvador Suris, one of the original vendors under the act of private sale, as well as the widow and heirs of his deceased brother, Ramón María Suris, the other original vendor, each executed deeds of sale of an undivided half interest in the property called "Perseguida" to Juan Suris Cardona, a son of José, and these acts of sale were put upon the public registry. A few days later the parties vendor to the acts above stated executed another notarial act in which they declared that the property had not been in their possession, but in the possession of the defendant Quiñones and the Bank of Porto Rico and therefore they had not collected revenues, and they ceded to the purchaser the right to collect such revenues. Under the ownership alleged to result from these acts this suit was commenced by Cardona to recover the property.

The findings in express terms establish that "From 1882 the property sued for ceased to belong to the brothers José Salvador and Ramón María Suris by reason of the sale set out in the private contract, and since then it has been in the quiet, peaceful and public possession, as owners, in good faith and by title of purchase of Stefani, later of Schluze & Company, then of the Banco de Puerto Rico, and finally of Quiñones, residents of Porto Rico." As to the purchase by Cardona, the plaintiff, from his father and the representatives of his deceased uncle, the findings expressly state: "When the plaintiff purchased the property sought to be recovered he knew the

history of it as here related and knew that his father and cousins had not possessed the same since the year 1882." And the conclusion reached as to the ultimate facts on this subject is thus expressed in the opinion of the court below: "In view of the manner in which the facts have occurred, we have no doubt whatever that the deeds of sale of the property in question executed in favor of Juan Suris Cardona have had no other purpose than that he should institute this suit to avail himself of and assert his rights as a third party and thus save his father and the heirs of his uncle from the consequences of the private document executed in favor of Stefani; and we are likewise convinced that the plaintiff knew the history of the said property before he made his purchase, and that his father and his cousins had not possessed the same since 1882, as stated in the complaint."

Applying the law to the facts stated, the court concluded: (a) "Under such conditions the plaintiff cannot claim the benefits which the law grants to third parties, because nobody can be a third party who, although he had not intervened in the first contract of sale, purchased, however, knowing that his vendors were not the owners and had no possession of the property sold. The same doctrine has already been established by this court in the case of *Voight* v. *Rivas* (1 Decisiones de Puerto Rico, 60), decided May 10, 1900." (b) From the possession which, as we have seen, the court found to have existed from 1882 in Stefani and his successors, Schulze & Company, the Bank of Porto Rico and Quiñones, and the various titles which were put upon the record in the transfers as made, especially the inclusion of the property in the plantation "Imisa," it was held that between the parties there was a sufficient basis laid for a just title and possession as owner in good faith adequate to sustain a prescription of ten years which was upheld.

The contentions for reversal are numerous and are

greatly multiplied by their reiteration in somewhat changed form of statement under the very many propositions and subdivisions of propositions embraced in the elaborate printed argument, but we dispose of them as follows:

First. Giving effect to the settled doctrine by which we do not disturb, but on the contrary, uphold, the action of the court below as to matters concerning purely local law except upon conviction on our part of clear error committed (*Nadal* v. *May*, 233 U. S. 447, 454; *Villanueva* v. *Villanueva*, 239 U. S. 293, 299), we at once dismiss from view the various contentions concerning the form of the pleadings, the question whether a default should not have been allowed as to the issues presented by certain amendments of the pleadings, the admissibility as between the parties or their successors or assigns of the act under private signature either because of the asserted ambiguity of its terms or the inadequacy of the number of witnesses to its execution, and many other subjects of a kindred nature too numerous to be recapitulated.

Second. We also at once put out of view the various contentions iterated and reiterated under every proposition which, while apparently accepting the findings, virtually dispute them, such as the contentions that the private instrument did not amount to a sale to Stefani because certain alleged bankruptcy proceedings referred to in the opinion of the court excluded the right of the Suris brothers at that time to sell the property, that no possession followed in Stefani from the making of the private sale because that instrument was one not importing possession in and of itself without proof of manual tradition, and also numerous other contentions of a kindred character concerning the judicial proceedings taken by Schulze & Company to acquire title and the deed of consolidation by them recorded which we further do not stop to specifically point out.

With these things disposed of, the remaining contentions come to this: That the decision of the court below was plainly violative of the local law known as the mortgage law and the general provisions of the code concerning the necessity of the public record of title to real estate and the protection afforded by the same, and that moreover an obvious disregard of the mortgage law and the provisions of the code resulted from giving to the sale under private signature and the proceedings and subsequent transmutations of title based upon it the character of a just title sufficient on its face to be the basis of the ten years' prescription under the code which the court below upheld. But when stripped of the confusion in the mode in which they are stated and reduced to their ultimate significance, all the contentions on these subjects are exclusively based upon the assumption that the plaintiff below was entitled to the protection afforded by the mortgage law to third persons and to the assumed inadequacy of the title relied upon by the defendant to sustain the ten years' prescription as against a third person. The propositions therefore in their essence when correctly understood but ignore or dispute the findings of the court below upon which its conclusion was expressly based that the plaintiff was not a third person either because he was merely a person interposed as a means of enabling him apparently to assert in his own name for the benefit of his authors in title, rights which they were incapable themselves of asserting, indeed could not without fraud on their part enjoy, or because if not in a strict sense a person interposed, he was nevertheless not a third person within the intendment of the local law because he acquired with full knowledge of the want of title in his vendors and of the absence of possession on their part and also with knowledge not only of an outstanding title, but of possession as owner which was then and had been enjoyed by the defendant and his predecessors in right. Thus to

bring the propositions to the true basis upon which they rest serves at once without more to establish their absolute want of foundation and to demonstrate the correctness of the judgment below and the duty to affirm it.

Affirmed.

UNITED STATES *v.* ANDREWS.

APPEAL FROM THE COURT OF CLAIMS.

No. 193. Argued January 21, 24, 1916.—Decided February 21, 1916.

Under Rev. Stat., § 1265, an officer of the army is entitled to half pay while on leave granted by proper authority.

No power has been conferred on the President to grant an army officer leave without pay, or to affix to an order granting leave a condition to that effect.

Whatever power the President may have to dismiss civil officers, it does not apply to officers of the Army and Navy, who, under Rev. Stat., § 1229, shall not in time of peace be dismissed except upon and in pursuance of the sentence of a court-martial or in commutation thereof.

An officer of the army granted, and accepting, leave without pay is not estopped from demanding the half pay allowed by statute, even though he did not protest at the affixing of such a condition to the order granting the leave. *Glavey* v. *United States*, 182 U. S. 595.

Accepting leave with the condition affixed that it be without pay does not amount to absence without leave for which pay cannot be allowed under the statute.

Public policy prohibits any attempt by unauthorized agreement with an officer of the United States, under guise of a condition or otherwise, to deprive him of the right to pay given by statute.

49 Ct. Cl. 707, affirmed.

THE facts, which involve the construction of statutes regulating pay of officers of the Army of the United States while on leave, are stated in the opinion.

Mr. Assistant Attorney General Huston Thompson for the United States:

The President had the power to make the order complained of which left appellee upon leave without pay. *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *United States* v. *Ross*, 239 U. S. 530.

Claimant having accepted the extension order by continuing on leave without pay, and not having made any protest or objection until more than two years afterwards, acquiesced.

The President's power to put appellee on leave without pay cannot be questioned; for, although § 1265, Rev. Stat., does not specifically grant him this power, it does not deny him such power. *Shurtleff* v. *United States*, 189 U. S. 311, 317.

If the President did exceed his powers in the order putting appellee upon leave without pay, then appellee was absent without authority and therefore on leave without pay under § 1265, Rev. Stat.

Neither *Glavey* v. *United States*, 182 U. S. 595, nor § 1229, Rev. Stat., is relevant to the issues here presented.

The President has the right to suspend an officer temporarily where the exigencies or good of the service demand it, or to furlough him for a definite period for the same reason, or to remove him entirely from office. *Ex parte Hennen*, 13 Pet. 259; *Blake* v. *United States*, 103 U. S. 227, 236; *Mullan* v. *United States*, 140 U. S. 240; *Parson* v. *United States*, 167 U. S. 324; *Shurtleff* v. *United States*, 189 U. S. 317.

Rev. Stat., § 1229, has nothing to do with the circumstances involved in this case, for the President did not drop appellee from the rolls of the Army or attempt to do so. *Hartigan* v. *United States*, 196 U. S. 169.

If the President be not controlled by § 1229, Rev. Stat., then his power to furlough appellee without pay would

be the same as though he were a civil employé. *United States* v. *Murray*, 100 U. S. 536.

The order of the President was a regulation for the internal administration of the Army, the maintenance of its discipline, clearly within his discretion, and not subject to review by the courts. It has been the general practice not only in the Army, but in the other departments of the Government, to grant leaves of absence without pay. To hold that this cannot be done, and that an officer of the Army or civilian employé could enjoy the privilege granted to him, and then bring suit to recover pay for the period of such leave, would create great inconvenience and confusion in the administration of the internal affairs of the Government.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellee.

Mr. Chief Justice White delivered the opinion of the court:

The United States appeals from a judgment awarding the appellee $325 found to be due him under Rev. Stat. § 1265 for half pay as a captain of cavalry of fifteen years' service for a period of three months from August 1 to October 31, 1907, during which time it was found he was absent on leave. The court stated the facts as follows:

"The claimant having accepted employment with a commercial company, was granted six months' leave of absence, to take effect January 1, 1907, by paragraph 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1, 1907, and to expire October 31, 1907, by paragraph 26, Special Orders, War Department, dated June 17, 1907.

"While the claimant was enjoying the extension of his leave of absence, The Adjutant General of the United

States Army on July 31, 1907, sent him the following telegram:

"'By direction of the President, although your leave is not revoked, your absence from this date will be without pay.'

"His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was $325."

It is apparent from the authorities cited in the *per curiam* opinion of the court below (*Glavey* v. *United States*, 182 U. S. 595; *Whiting* v. *United States*, 35 Ct. Cl. 291, 301; *Dyer* v. *United States*, 20 Ct. Cl. 166) that the allowed recovery was based upon the conclusion that the half pay during the leave of absence was expressly sanctioned by law (Rev. Stat., § 1265) and hence any condition conflicting with such statutory right was void and that the officer being entitled to rely upon the statute, no estoppel against him could be implied because of his having acted upon the leave, albeit it contained a condition in conflict with the rights conferred by the statute. To test the merits of these conclusions will dispose of the entire case, since all the contentions of the Government are embraced in three propositions: 1, the asserted existence of authority to grant the leave conditioned on its being without pay notwithstanding the statute; 2, even if such power did not exist the binding effect of the condition upon the officer who accepted the leave which was subject to it; and 3, in any event the impossibility of separating the grant of leave from the condition upon which the leave was based, thus under the hypothesis of illegality rendering the grant void and causing the ab-

sence from duty which was enjoyed under the apparent sanction of the grant to be an absence without leave for which under the statute no right to pay existed. It is manifest that these contentions assume, as did the conclusions of the court below, that the telegram stated in the findings operated to grant a new leave for the three months therein specified subject to the condition that it should be without pay, and in separately testing the propositions we shall treat the telegraphic order as having that significance.

1. As in view of the plain text of Rev. Stat., § 1265, there is no room for disputing that the right to half pay during the period of the leave in question was conferred by the statute, there is and can be no dispute that tested by the statute alone the court below did not err in allowing the claim for such half pay. But the contention is that error was committed because the conferring of the right to pay by the statute was not exclusive and therefore did not deprive of the authority as an incident to the power to grant the leave to affix the condition that the leave should be without pay notwithstanding the statute. It is unnecessary, however, to stop to point out the unsoundness of this proposition, since the error upon which it rests is authoritatively demonstrated by previous decisions which substantially leave the proposition not open for discussion. *United States* v. *Williamson*, 23 Wall. 411, 416; *United States* v. *Wilson*, 144 U. S. 24; *United States* v. *Shields*, 153 U. S. 88, 91; *Glavey* v. *United States*, 182 U. S. 595. Nor in contemplation of the cases which we have just cited and additionally in view of the provision of Rev. Stat., § 1229, that "no officer in the military, or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," is there any necessity to point out the want of application of the authorities dealing with the power to dismiss civil

officers which are cited as a basis for the proposition that a like power applies to army officers and therefore as there was authority to dismiss, the lesser right of granting the leave without pay necessarily obtained. So also it is unnecessary to enter into any detailed analysis of the decision in *Hartigan* v. *United States*, 196 U. S. 169, since that case concerned the power to remove a cadet at the Military Academy and the recognition of the right to exercise that authority was in express terms based upon the view that although in a sense a part of the army cadets at the Military Academy were not officers within the intendment of Rev. Stat., § 1229, and indeed the opinion in the *Hartigan Case* in substance refutes the extreme contention as to power which is now sought to be sustained.

2. The contention as to the estoppel resulting from the failure to protest against the condition affixed to the leave and the binding force of such condition even if illegal, resulting from an acceptance of the leave containing it, is by necessary implication foreclosed by all the cases previously cited and in fact was in express terms considered and held to be without merit in *Glavey* v. *United States*, *supra*. Because that case concerned an illegal condition attached to the performance of the duties of an office and this involves an illegal condition attached to a grant of leave affords no ground for distinction between that case and this. The basis of the ruling in the *Glavey Case* was the right of the official to rely upon the provisions of the statute and the resulting want of power to apply a principle of estoppel. And as here there was express statutory authority for the half pay during the leave, the reason in the *Glavey Case* is controlling and the distinction relied upon involves no difference justifying taking this case out of the principle settled in the *Glavey Case*. As the statute conferred the right to the half pay during the leave, it necessarily follows that the exclusion of executive authority over that subject which resulted extended to

and was coterminous with the power which the statute exerted.

3. The contention that even if the condition which was attached to the leave be treated as illegal and the acceptance of the leave containing it be decided not to have operated an estoppel, nevertheless under such circumstances the leave must be treated as void and the absence based on it be held to have been one without leave for which no pay could be allowed under the statute, is self-contradictory and besides in its essence must rest upon the assumption that there was power to affix the condition, the terms of the statute to the contrary notwithstanding. The contention therefore is in substance foreclosed by *Glavey* v. *United States*, *supra*, and the decided cases to which we have previously referred. How completely this is the case will be demonstrated by observing that the decision in the *Glavey Case* was expressly based on the ground that public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to the pay given by the statute. And of course the contention now made that the absence with leave which carried pay under the statute was converted into an absence without leave carrying no pay in consequence of an unauthorized attempt to subject the granted leave to an illegal provision that it should be without pay is absolutely in conflict with the previous cases and the rule of public policy upon which they were based. In fact the contention but in a changed form asserts the application of estoppel which as we have seen was expressly adversely disposed of in the previous cases.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

MALE, TRUSTEE FOR CHAPIN, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 220. Argued January 24, 1916.—Decided February 21, 1916.

Whether a subsequent decision between the same parties upon the same cause of action makes the questions involved in the earlier decision moot involves the defense of the thing adjudged going to the merits, and cannot be considered on a direct appeal under § 238, Jud. Code, on which this court can only consider the question of the jurisdiction of the court below.

So far as controversies in a case brought in the Federal court depend alone upon the right to sue because of the district in which the parties reside, they are personal and susceptible of being waived, and are not intrinsically and necessarily Federal; but if they involve Federal privileges not waived, they are Federal questions susceptible of being brought to this court by direct appeal under § 238, Jud. Code.

The asserted right to a judgment on bonds of a corporation created by act of Congress involves an inherently Federal question.

A corporation is entitled to be sued in the district of its residence; and, without the consent of such corporation, the District Court of the United States for another district has no jurisdiction of an action involving an inherently Federal question.

THE facts, which involve the jurisdiction of this court under § 238, Jud. Code, and of the District Court under § 51, Jud. Code, are stated in the opinion.

Mr. William G. Cooke for appellant:

The provisions of § 37, Jud. Code, have no application to a case where there was Federal jurisdiction before the assignment.

Even where diversity of citizenship is created by an assignment, the mere fact that the purpose was to make the case one of Federal cognizance, is no evidence of such

impropriety or collusion as will justify a dismissal of the complaint. *Crawford* v. *Neal*, 144 U. S. 585; *South Dakota* v. *North Carolina*, 192 U. S. 286; *O'Neil* v. *Walcott Co.*, 174 Fed. Rep. 527. See also *Water Co.* v. *Portage*, 102 Fed. Rep. 771; *Bolles* v. *Lehigh Valley R. R.*, 127 Fed. Rep. 884; *Stimson* v. *United Machine Co.*, 156 Fed. Rep. 298; *Consolidated Rubber Co.* v. *Ferguson*, 183 Fed. Rep. 756.

Plaintiff, as trustee, is the legal holder and owner of the bonds, so that it is his citizenship and not that of the beneficiary, which determines the State in which suit must be brought. *Cochrane* v. *Schell*, 140 N. Y. 534; *Gott* v. *Cook*, 7 Paige, 521; *Gilman* v. *McArdle*, 99 N. Y. 451.

The indenture reserves no power of revocation in the grantor; but even if it had, that circumstance would not have invalidated the trust or affected the trustee's title or right of possession. *Locke* v. *Farmers' L. & T. Co.*, 140 N. Y. 135; *Von Hesse* v. *MacKaye*, 136 N. Y. 115.

The right of a trustee of an express trust to sue in his own name, in the State of New York, is fixed by statute. Code Civ. Pro., § 449.

A trustee may sue in the Federal court of the State of which he is a citizen, without reference to the place of the beneficiary's citizenship. *Dodge* v. *Tulleys*, 144 U. S. 451; *Johnson* v. *St. Louis*, 172 Fed. Rep. 31; *New Orleans* v. *Gaines*, 138 U. S. 606.

Mr. Walker D. Hines for appellee.

Mr. Chief Justice White delivered the opinion of the court.

On this direct appeal a reversal is sought of a decree below which dismissed the bill for want of jurisdiction. There is a motion to dismiss on the ground that "the questions involved upon this appeal are moot ques-

tions . . . for the reason that subsequent to the dismissal of the bill herein by the lower court the appellant as plaintiff instituted in the Supreme Court of the State of New York, County of New York, an action upon the same alleged cause of action against the same defendants and that such action in the Supreme Court of the State of New York was heard and determined and that a final judgment upon the merits therein was rendered dismissing the complaint filed in said action as against this appellee." But as our power to review is limited to the question of jurisdiction alone and as the ground of the motion obviously involves the defense of "the thing adjudged," going to the merits, the motion to dismiss is overruled and we come to consider the question of the jurisdiction of the court below, that is, whether as a Federal court it had power to entertain the cause. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 233; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175; *Farrugia* v. *Phila. & Read. Ry.*, 233 U. S. 352.

The bill alleged that the complainant, Male, who sued as the trustee of Gilbert W. Chapin, was a citizen of the State of New York and an inhabitant and resident of the Southern District thereof. The defendants were the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, the Atchison, Topeka & Santa Fe Railroad Company, a corporation organized under an act of the legislature of the territory of Kansas, the Atchison, Topeka & Santa Fe Railway Company, a corporation organized under the laws of the State of Kansas, and the Boston Safe Deposit & Trust Company, a corporation organized under the laws of the State of Massachusetts. We do not stop to summarize the averments of the bill in order to make clear the nature of the relief sought because we accept as adequate for the purpose of the question before us the statement made on that subject in the printed argument filed on behalf of

the appellant as follows: "The relief prayed for is judgment for $120,000 and interest upon certain income bonds issued by the Atlantic & Pacific Railroad Company on the 1st day of October, 1880, and maturing October 1st, 1910, and for an adjudication that The Atchison, Topeka & Santa Fe Railway Company (the present appellee) is liable in equity for the amount of such judgment by reason of the matters set forth in the bill of complaint." As further stated in the argument for the appellant, the bill alleged that the Atlantic & Pacific Railroad Company "is practically out of existence and has not been nor can it be served with process" and that the Atchison, Topeka & Santa Fe Railroad Company and the Boston Safe Deposit & Trust Company were not served with process and are not deemed to be necessary parties to the cause and may be put out of view. The Atchison, Topeka & Santa Fe Railway Company, the only other defendant (the appellee) was served through one of its officers in the City of New York. It thereupon appeared specially and "for the single and sole purpose of making a motion to set aside the service of the subpœna and dismiss the bill of complaint as to it for want of jurisdiction over the person of said defendant." And subsequently it moved to dismiss on two grounds: 1. That as its residence was in Kansas, it could not be sued outside of the district of which it was a resident without its consent, and that as Male, the complainant, was only colorably joined as a complainant, the real party being Chapin for whom Male assumed to act as trustee and who was a citizen and resident of Connecticut, there was no jurisdiction over the cause as the suit was brought in the district of the residence of neither of the real parties; and, 2, that as the complainant sought to enforce a liability on the bonds of the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, involving an inherently Federal question, there was no jurisdiction in the court over the

defendant because under such circumstances it was entitled to be sued in the court of the district of its residence and could not without its consent be impleaded in the district of the residence of the plaintiff even if Male was treated as the real plaintiff and entitled otherwise to sue in the Southern District of New York. As stated in the certificate of the court below, the judgment of dismissal for want of jurisdiction was based upon both of the grounds, that is, the want of authority to sue in the Southern District of New York because that was the district of the residence of neither of the parties and because owing to the Federal question the defendant was entitled to be sued in the district of its residence.

It is not disputable that in so far as the contentions as to jurisdiction depended alone upon the right to sue because of the district in which the parties resided, they did not present questions of inherent Federal jurisdiction. We say this because controversies as to such subjects concern a personal privilege susceptible of being waived, which would not be the case if they involved contentions which were intrinsically and necessarily Federal. *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127; *Ex parte Wisner*, 203 U. S. 449; *In re Moore*, 209 U. S. 490; *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368. But while this is the case it is yet also true that questions of jurisdiction depending upon controversies as to the district of residence where the statutory rights in that regard have not been waived, when decided below, are questions of Federal jurisdiction susceptible of being brought here by direct appeal under the provisions of § 238 of the Judicial Code. *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10; *United States* v. *Congress Construction Co.*, 222 U. S. 199.

Our power to review thus being settled, the only question is, Did the court err in holding that as a Federal court within the meaning of the statute it had no authority under the circumstances to entertain the cause? In

solving this issue, without expressing any opinion as to the want of jurisdiction based upon the contention that Male the complainant had no real but only a colorable and fictitious interest and hence that the suit was brought neither in the district of the residence of the complainant nor that of the defendant, and confining our attention to the ruling that there was a want of power to entertain the cause in any other than the district of the residence of the defendant, because of the inherently Federal question presented, we think that the refusal to take jurisdiction was clearly right and should be affirmed. Undoubtedly the asserted right to a judgment on the bonds of the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, involved an inherently Federal question. *Osborn* v. *United States Bank*, 9 Wheat. 738; *Wash. & Idaho R. R.* v. *Coeur d'Alene Ry.*, 160 U. S. 77; *Matter of Dunn*, 212 U. S. 374; *Tex. & Pac. Ry.* v. *Hill*, 237 U. S. 208. This being true, it is also indisputable that the defendant was entitled to be sued in the district of its residence and was not without its consent liable to be sued within the district of the residence of the complainant. *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501; Judicial Code, § 51.

As it follows that no error was committed by the court below in holding that it was without power to exercise jurisdiction of the cause, its decree must be and it is

Affirmed.

STANTON *v.* BALTIC MINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 359. Argued October 14, 15, 1915.—Decided February 21, 1916.

Brushaber v. *Un. Pac. R. R.*, *ante*, p. 1, followed to effect that the District Court has jurisdiction of an action by a stockholder against the corporation to enjoin it from voluntarily paying the tax under the Income Tax Law of 1913 on the ground of its unconstitutionality.

This court has, under § 238, Jud. Code, jurisdiction of a direct appeal from the judgment of the District Court refusing to enjoin a corporation from paying the tax under the Income Tax Law of 1913, in a suit brought by a stockholder on the ground of unconstitutionality of the statute.

The Income Tax Law of 1913 is not unconstitutional as not conforming with, or being beyond the authority of, the Sixteenth Amendment. *Brushaber* v. *Un. Pac. R. R.*, *ante*, p. 1.

There is no authority for taking taxation of mining corporations out of the rule established by the Sixteenth Amendment; nor is there any basis for the contention that, owing to inadequacy of the allowance for depreciation of ore body, the income tax of 1913 is equivalent to one on the gross product of mines, and as such a direct tax on the property itself, and therefore beyond the purview of that amendment and void for want of apportionment.

Independently of the operations of the Sixteenth Amendment, a tax on the product of the mine is not a tax upon property as such because of its ownership, but is a true excise levied on the result of the business of carrying on mining operations. *Stratton's Independence* v. *Howbert*, 231 U. S. 399.

THE facts, which involve the constitutionality and construction of provisions of the Income Tax Law of 1913, and its application to mining corporations, are stated in the opinion.

Mr. Charles A. Snow for appellant:

The Income Tax Law, as applied to mining companies, directly taxes a portion of their principal or capital, with-

out apportionment according to population, and, therefore, is unconstitutional. Direct taxes on principal or capital, not being taxes on income, are not authorized by the Sixteenth Amendment.

Stratton's Independence, 231 U. S. 399, which is sole reliance of Government, holds merely that sales of ore do not represent principal exclusively, but include capital, in part, and income, in part, and differs essentially from case at bar.

Net income is the gain or profit derived from the use of capital, without impairment thereof. Unless the principal is left intact, by proper allowances for losses, depreciation and depletion of capital assets, the proceeds from sales of mining products cannot represent "net income" wholly and exclusively. See *Nipissing Mines Case*, 202 Fed. Rep. 803; *Von Baumbach* v. *Sargent Land Co.*, 207 Fed. Rep. 423; 219 Fed. Rep. 31; *Stevens* v. *Hudson's Bay Co.*, 101 L. T. Rep. 96. Exhaustion of value of ore deposits by mining and sale does not differ essentially from sale of land at a purchase price payable in yearly instalments. *Secretary* v. *Scoble*, 89 L. T. Rep. 1; *Foley* v. *Fletcher*, 3 H. & N. 769. See also *Merchants' Ins. Co.* v. *McCartney*, Fed. Cas. 9,443; *Commonwealth* v. *Central Transp. Co.*, 145 Pa. St. 80; *Gibson* v. *Cooke*, 1 Met. 75.

Mining dividends are distributable, although largely capital, because such action is contemplated by purposes of the charter. *Lee* v. *Neuchatel Co.*, L. R. 41 Ch. Div. 1.

Cases arising under wills or trusts, and involving rights of life tenants in mining properties, have no proper application here. They rest on the terms of the trust. *Daly* v. *Beckett*, 24 Beav. 114; *Eley's Appeal*, 103 Pa. St. 300.

Taxation cases cited have no importance here, as they arise under laws totally different. *Gay* v. *Baltic Mining Co.*, 220 U. S. 107; *Coltness Iron Co.* v. *Black*, L. R. 6 App. Cas. 315; *Commonwealth* v. *Ocean Oil Co.*, 59 Pa. St.

61; *Commonwealth* v. *Penn Gas Coal Co.*, 62 Pa. St. 241.

Depreciation, depletion and losses must be allowed for in any income tax. Unless allowed for, the tax is not limited to income, but also covers a portion of the principal. And this is true, not merely of wasting properties, like mines, but also of all kinds of depreciable property.

The Income Tax Law arbitrarily, capriciously and unequally discriminates between mining companies and all other classes of corporations, without any reasonable basis for distinction or classification. It, accordingly, deprives mining companies of their property without "due process of law," as guaranteed by the Fifth Amendment. The special clause limiting mines to a maximum allowance of five per cent of their annual gross receipts or output, for depletion of ore deposits, is unconstitutional. Or, if the clause is not separable, the entire Income Tax Law is unconstitutional, as applied to mining companies.

As palpably arbitrary classification, this law, as applied to mines, is unconstitutional, because it violates due process of law, as guaranteed by the Fifth Amendment.

The distinction between mining companies and other classes of corporations, for purposes of direct taxation, would afford no reasonable basis for classification. See *Gulf, Colorado &c.* v. *Ellis*, 165 U. S. 150; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642; *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Southern R. R. Co.* v. *Greene*, 216 U. S. 400; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, distinguished, and see *Smith* v. *Texas*, 233 U. S. 630; *San Bernardino* v. *Southern Pac. R. R.*, 118 U. S. 417; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Michigan Central Railroad* v. *Powers*, 201 U. S. 245; *Ohio Tax Cases*, 232 U. S. 576. Distinctions between mining and other corporations, for purposes of taxation, are merely fanciful.

Mining lands, in no essential respect, differ from farming lands or other forms of real estate.

The discrimination against mines is of an "unusual character" wholly "unknown to the practice of our governments," and is pure favoritism, class legislation and palpably arbitrary classification, resting upon no reasonable basis for distinction.

The act is open to other general constitutional objections, founded on palpably arbitrary discrimination against all corporations.

The tax amounts to double taxation, in case of operating corporations controlled by holding companies.

Under the Fifth Amendment, Congress is prohibited from enacting laws, which are palpably arbitrary and unequal, resting upon no reasonable basis for classification. Such laws deprive a taxpayer of his property without due process of law. The Fifth Amendment, however, allows reasonable classification. Such laws also are void, because they violate the implied limits to the power of taxation which are inherent in our form of government.

The obvious limitations upon the tax powers of Congress are not affected by the Sixteenth Amendment, so far as property taxation is concerned, except that it authorizes direct income taxes, when they are not arbitrary, unequal or oppressive.

The Sixteenth Amendment merely obviated the objection founded on lack of apportionment, leaving open all other constitutional objections to an income tax.

Direct taxation upon incomes must still be imposed subject to the rule of equality and uniformity.

The five per cent clause is separable from remainder of Income Tax law. It may be declared unconstitutional and the remainder of the act allowed to stand. Or the law may be declared void, as applied to mines. *Adams Express Co.* v. *Ohio*, 165 U. S. 194; 166 U. S. 185; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Appeal of Shoemaker*, 106 Pa. St. 392; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Ballard* v. *Hunter*, 204 U. S. 241; *Baltic*

Mining Co. v. *Massachusetts*, 231 U. S. 68; *Bank of Columbia* v. *Okely*, 4 Wheat. 235; *Barbier* v. *Connolly*, 113 U. S. 27; *Barrett* v. *Indiana*, 229 U. S. 26; *Beers* v. *Glynn*, 211 U. S. 477; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232; *Berea College* v. *Kentucky*, 211 U. S. 45; Black, Income Tax, §§ 32, 34; Blackstone, Commentaries, Vol. 2, p. 282; Blackstone, Commentaries, Vol. 2, p. 18; *Bradley* v. *Richmond*, 227 U. S. 477; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; *Buford* v. *Houtz*, 123 U. S. 320; *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680; *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Clark* v. *Kansas City*, 176 U. S. 114; Co. Lit. 4 (*a*), 4 (*b*); *Cook* v. *Marshall County*, 196 U. S. 261; Cooley, Const. Law, p. 387; Cooley, Const. Lim., pp. 434, 490; *Coulter* v. *Louisville & N. R. R. Co.*, 196 U. S. 599; *Covington* v. *First National Bank*, 198 U. S. 100; *Cox* v. *Texas*, 202 U. S. 446; *Daly* v. *Beckett*, 24 Beav. 114; *Davidson* v. *New Orleans*, 96 U. S. 97; *Denver* v. *New York Trust Co.*, 229 U. S. 123; *District of Columbia* v. *Brooke*, 214 U. S. 138.

The Solicitor General and *Mr. Assistant Attorney General Wallace* for the United States as *amicus curiæ* in support of the decree appealed from.[1]

Mr. Chief Justice White delivered the opinion of the court.

As in *Brushaber* v. *Union Pacific R. R.*, *ante*, p. 1, this case was commenced by the appellant as a stockholder of the Baltic Mining Company, the appellee, to enjoin the voluntary payment by the corporation and its officers of the tax assessed against it under the Income Tax section of the Tariff Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 181. As the grounds for the equitable relief

[1] For abstract of argument in this and other cases argued simultaneously herewith, see p. 5, *ante*.

sought in this case so far as the question of jurisdiction is concerned are substantially the same as those which were relied upon in the *Brushaber Case*, it follows that the ruling in that case upholding the power to dispose of that controversy is controlling here and we put that subject out of view.

Further also like the *Brushaber Case* this is before us on a direct appeal prosecuted for the purpose of reviewing the action of the court below in dismissing on motion the bill for want of equity.

The bill averred: "That, under and by virtue of the alleged authority contained in said Income Tax law, if valid and constitutional, the respondent company is taxable at the rate of 1 per cent. upon its gross receipts from all sources, during the calendar year ending December 31, 1914, after deducting (1) its ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties and (2) all losses actually sustained within the year and not compensated by insurance or otherwise, including depreciation arising from depletion of its ore deposits to the limited extent of 5% of the 'gross value at the mine of the output' during said year." It was further alleged that the company would if not restrained make a return for taxation conformably to the statute and would pay the tax upon the basis stated without protest and that to do so would result in depriving the complainant as a stockholder of rights secured by the Constitution of the United States as the tax which it was proposed to pay without protest was void for repugnancy to that Constitution. The bill contained many averments on the following subjects which may be divided into two generic classes: (A) Those concerning the operation of the law in question upon individuals generally and upon other than mining corporations and the discrimination against mining corporations which arose in favor of such other corporations and in-

dividuals by the legislation, as well as discrimination which the provisions of the act operated against mining corporations because of the separate and more unfavorable burden cast upon them by the statute than was placed upon other corporations and individuals—, averments all of which were obviously made to support the subsequent charges which the bill contained as to the repugnancy of the law imposing the tax to the equal protection, due process and uniformity clauses of the Constitution. And (B) those dealing with the practical results on the company of the operation of the tax in question evidently alleged for the purpose of sustaining the charge which the bill made that the tax levied was not what was deemed to be the peculiar direct tax which the Sixteenth Amendment exceptionally authorized to be levied without apportionment and of the resulting repugnancy of the tax to the Constitution as a direct tax on property because of its ownership levied without conforming to the regulation of apportionment generally required by the Constitution as to such taxation.

We need not more particularly state the averments as to the various contentions in class (A), as their character will necessarily be made manifest by the statement of the legal propositions based on them which we shall hereafter have occasion to make. As to the averments concerning class (B), it suffices to say that it resulted from copious allegations in the bill as to the value of the ore body contained in the mine which the company worked and the total output for the year of the product of the mine after deducting the expenses as previously stated, that the five per cent. deduction permitted by the statute was inadequate to allow for the depletion of the ore body and therefore the law to a large extent taxed not the mere profit arising from the operation of the mine, but taxed as income the yearly product which represented to a large extent the yearly depletion or exhaustion of

the ore body from which during the year ore was taken. Indeed, the following alleged facts concerning the relation which the annual production bore to the exhaustion or diminution of the property in the ore bed must be taken as true for the purpose of reviewing the judgment sustaining the motion to dismiss the bill.

"That the real or actual yearly income derived by the respondent company from its business or property, does not exceed $550,000. That, under the Income Tax, the said company is held taxable, in an average year, to the amount of approximately $1,150,000, the same being ascertained by deducting from its net receipts of $1,400,000 only a depreciation of $100,000 on its plant and a depletion of its ore supply limited by law to 5% of the value of its annual gross receipts and amounting to $150,000; whereas, in order properly to ascertain its actual income $750,000 per annum should be allowed to be deducted for such depletion, or five times the amount actually allowed."

Without attempting minutely to state every possible ground of attack which might be deduced from the averments of the bill, but in substance embracing every material grievance therein asserted and pressed in argument upon our attention in the elaborate briefs which have been submitted, we come to separately dispose of the legal propositions advanced in the bill and arguments concerning the two classes.

Class A. Under this the bill charged that the provisions of the statute "are unconstitutional and void under the Fifth Amendment, in that they deny to mining companies and their stockholders equal protection of the laws and deprive them of their property without due process of law," for the following reasons:

(1) Because all other individuals or corporations were given a right to deduct a fair and reasonable percentage for losses and depreciation of their capital and they were

therefore not confined to the arbitrary 5% fixed as the basis for deductions by mining corporations.

(2) Because by reason of the differences in the allowances which the statute permitted the tax levied was virtually a net income tax on other corporations and individuals and a gross income tax on mining corporations.

(3) Because the statute established a discriminating rule as to individuals and other corporations as against mining corporations on the subject of the method of the allowance for depreciations.

(4) Because the law permitted all individuals to deduct from their net income dividends received from corporations which had paid the tax on their incomes, and did not give the right to corporations to make such deductions from their income of dividends received from other corporations which had paid their income tax. This was illustrated by the averment that 99 per cent. of the stock of the defendant company was owned by a holding company and that under the statute not only was the corporation obliged to pay the tax on its income, but so also was the holding company obliged to pay on the dividends paid it by the defendant company.

(5) Because of the discrimination resulting from the provision of the statute providing for a progressive increase of taxation or surtax as to individuals and not as to corporations.

(6) Because of the exemptions which the statute made of individual incomes below $4,000 and of incomes of labor organizations and various other exemptions which were set forth.

But it is apparent from the mere statement of these contentions that each and all of them were adversely disposed of by the decision in the *Brushaber Case* and they all therefore may be put out of view.

Class B. Under this class these propositions are relied upon:

(1) That as the Sixteenth Amendment authorizes only an exceptional direct income tax without apportionment, to which the tax in question does not conform, it is therefore not within the authority of that Amendment.

(2) Not being within the authority of the Sixteenth Amendment the tax is therefore, within the ruling of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, a direct tax and void for want of compliance with the regulation of apportionment.

As the first proposition is plainly in conflict with the meaning of the Sixteenth Amendment as interpreted in the *Brushaber Case*, it may also be put out of view. As to the second, while indeed it is distinct from the subjects considered in the *Brushaber Case* to the extent that the particular tax which the statute levies on mining corporations here under consideration is distinct from the tax on corporations other than mining and on individuals which was disposed of in the *Brushaber Case*, a brief analysis will serve to demonstrate that the distinction is one without a difference and therefore that the proposition is also foreclosed by the previous ruling. The contention is that as the tax here imposed is not on the net product but in a sense somewhat equivalent to a tax on the gross product of the working of the mine by the corporation, therefore the tax is not within the purview of the Sixteenth Amendment and consequently it must be treated as a direct tax on property because of its ownership and as such void for want of apportionment. But aside from the obvious error of the proposition intrinsically considered, it manifestly disregards the fact that by the previous ruling it was settled that the provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed

in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed. Mark, of course, in saying this we are not here considering a tax not within the provisions of the Sixteenth Amendment, that is, one in which the regulation of apportionment or the rule of uniformity is wholly negligible because the tax is one entirely beyond the scope of the taxing power of Congress and where consequently no authority to impose a burden either direct or indirect exists. In other words, we are here dealing solely with the restriction imposed by the Sixteenth Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect to which it generically belongs and putting it in the class of direct to which it would not otherwise belong in order to subject it to the regulation of apportionment. But it is said that although this be undoubtedly true as a general rule, the peculiarity of mining property and the exhaustion of the ore body which must result from working the mine, causes the tax in a case like this where an inadequate allowance by way of deduction is made for the exhaustion of the ore body to be in the nature of things a tax on property because of its ownership and therefore subject to apportionment. Not to so hold, it is urged, is as to mining property but to say that mere form controls, thus rendering in substance the command of the Constitution that taxation directly on property because of its ownership be apportioned, wholly illusory or futile. But this merely asserts a right to take the taxation of mining corporations out of the rule established by the Sixteenth Amendment when there is no authority for so doing. It moreover rests upon the wholly fallacious

assumption that looked at from the point of view of substance a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because independently of the effect of the operation of the Sixteenth Amendment it was settled in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations (pp. 413 *et seq.*)

As it follows from what we have said that the contentions are in substance and effect controlled by the *Brushaber Case* and in so far as this may not be the case are without merit, it results that for the reasons stated in the opinion in that case and those expressed in this, the judgment must be and it is

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

TYEE REALTY COMPANY *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE.

THORNE *v.* SAME.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 393, 394. Argued October 14, 15, 1915.—Decided February 21, 1916.

Brushaber v. *Un. Pac. R. R.*, *ante*, p. 1, followed to effect that the Income Tax provisions of the Tariff Act of 1913 are not unconstitutional either because not sanctioned by the Sixteenth Amendment and otherwise beyond the general taxing power of Congress, or because of its retroactive operation for a designated period, or because of discriminations, inequalities or progressive increases on incomes of individuals or the method provided for computing income of corporations.

THE facts, which involve the constitutionality and construction of the Income Tax Law of 1913, are stated in the opinion.

Mr. Julien T. Davies, with whom *Mr. Brainard Tolles*, *Mr. Garrard Glenn* and *Mr. Martin A. Schenck* were on the brief, for plaintiffs in error:

The effect of the Sixteenth Amendment was merely to waive the requirement of apportionment among the States in its application to a general and uniform tax upon incomes from whatever source derived. The Income Tax Law of 1913, except in so far as the tax thereby imposed is in reality such a general and uniform tax on incomes, derives no support from the Sixteenth Amendment.

In its progressive feature, the statute classifies persons according to their wealth in a manner which is both arbitrary and unreasonable.

In the light of its history, it is clear that the Sixteenth Amendment does not sanction progressive taxation.

Under the views which this court has expressed in other

cases involving similar principles, the discrimination effected by the present statute violates the express provisions of the Constitution.

So much of § 2 of the Act of October 3, 1913, as limits the interest which may be deducted in ascertaining the taxable income of a corporation to the interest accrued and paid within the year on an amount of indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock, is invalid. The discrimination is unwarranted by the Sixteenth Amendment. The tax does not rest upon income in the true sense of the word. The classification is arbitrary and unreasonable.

The discriminations which the statute effects, in regard to the progressive features of the tax, are illustrated by the exemptions which it allows.

Inasmuch as a large amount of the taxed income actually accrued to and was received by the plaintiff prior to October 3, 1913, the date of the adoption of the statute, and there was no competent evidence before the Commissioner that any income whatever had been received by the plaintiff subsequent to that date, the statute is not justified by the Sixteenth Amendment, and the tax was illegally collected.

Numerous authorities sustain the contentions of plaintiff in error.

The Solicitor General and *Mr. Assistant Attorney General Wallace* for defendant in error.[1]

Mr. Chief Justice White delivered the opinion of the court.

Both the plaintiffs in error, the one in 393 a corporation and the other in 394 an individual, paid under protest

[1] For abstract of argument in this and other cases argued simultaneously herewith, see p. 5, *ante*.

to the Collector of Internal Revenue, taxes assessed under the Income Tax section of the Tariff Act of October 3, 1913 (§ II, ch. 16, 38 Stat. 166). After an adverse ruling by the Commissioner of Internal Revenue on appeals which were prosecuted conformably to the statute (Rev. Stat., §§ 3220, 3226) by both the parties for a refunding to them of the taxes paid, these suits were commenced to recover the amounts paid on the ground of the repugnancy to the Constitution of the section of the statute under which the taxes had been collected, and the cases are here on direct writs of error to the judgments of the court below sustaining demurrers to both complaints on the ground that they stated no cause of action.

Every contention relied upon for reversal in the two cases is embraced within the following propositions: (a) that the tax imposed by the statute was not sanctioned by the Sixteenth Amendment because the statute exceeded the exceptional and limited power of direct income taxation for the first time conferred upon Congress by that Amendment and, being outside of the Amendment and governed solely therefore by the general taxing authority conferred upon Congress by the Constitution, the tax was void as an attempt to levy a direct tax without apportionment under the rule established by *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601. (b) That the statute is moreover repugnant to the Constitution because of the provision therein contained for its retroactive operation for a designated time and because of the illegal discriminations and inequalities which it creates, including the provision for a progressive tax on the income of individuals and the method provided in the statute for computing the taxable income of corporations.

But we need not now enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed of in *Brushaber* v. *Union Pacific R. R.*, *ante*, p. 1. That case,

therefore, is here absolutely controlling and decisive. It follows that for the reasons stated in the opinion in the *Brushaber Case* the judgments in these cases must be and they are

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of these cases.

DODGE *v.* OSBORN, COMMISSIONER OF INTERNAL REVENUE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 396. Argued October 14, 15, 1915.—Decided February 21, 1916.

Revised Stat., § 3224, is not inapplicable to taxes imposed by the Income Tax Law of 1913, but is clearly within the contemplation of par. L, of the Law, 38 Stat. 179.

The provisions of Rev. Stat., §§ 3220, 3226, 3227, are also applicable to proceeding for recovery of taxes erroneously or illegally assessed and collected under the Income Tax Law of 1913.

A suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it.

The facts that many suits would have to be brought by persons to recover taxes paid under an unconstitutional statute and that meanwhile, under Rev. Stat., § 3187, taxes imposed become a lien and constitute a cloud on the title of property, *held* inadequate to sustain jurisdiction of a suit in equity to restrain the collection of taxes on the ground of unconstitutionality of the statute imposing them.

There is no violation of due process of law under the Fifth Amendment in the provisions of Rev. Stat., §§ 3220, 3226 and 3227, requiring an

appeal to the Commissioner of Internal Revenue after payment of taxes and only having a right to sue after his refusal to refund.
43 App. D. C. 144, affirmed.

THE facts, which involve the jurisdiction of the District Court of suits brought to restrain the collection of taxes and the construction and application of §§ 3220, 3224, 3226 and 3227, Rev. Stat., are stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Fred A. Baker* was on the brief, for appellants.

The Solicitor General and *Mr. Assistant Attorney General Wallace* for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellants filed their bill in the Supreme Court of the District of Columbia against the Commissioner of Internal Revenue to enjoin the assessment and collection of the taxes imposed by the Income Tax section of the Tariff Act of October 3, 1913, c. 16, § II, 38 Stat. 166, 181, and especially the surtaxes therein provided for on the ground that the statute was void for repugnancy to the Constitution of the United States. The case is here on appeal from the judgment of the court below affirming the action of the trial court in sustaining a motion to dismiss the complaint for want of jurisdiction because the complainants had an adequate remedy at law and because of the provision of Rev. Stat., § 3224, that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

We at once put out of view a contention that Rev. Stat., § 3224, is not applicable to taxes imposed by the Income Tax Law since we are clearly of the opinion that

it is within the contemplation of paragraph L (38 Stat. 179), of the act which provides:

"That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed."

And for the same reason we do not further notice a contention as to the inapplicability of Rev. Stat., §§ 3220, 3226, 3227, to which effect was given by the court below requiring an appeal to the Commissioner of Internal Revenue after payment of a tax claimed to have been erroneously or illegally assessed and collected and upon his refusal to return the sum paid giving a right to sue for its recovery.

The question for decision therefore is whether the sections of the Revised Statutes referred to are controlling as to the case in hand. The plain purpose and scope of the sections are thus stated in *Snyder* v. *Marks*, 109 U. S. 189, 193–194, a suit brought to enjoin the collection of a revenue tax on tobacco:

"The inhibition of Rev. Stat., § 3224, applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. . . . *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures,

not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment (assessment) and claim that it is valid."

And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.

But it is contended that this doctrine has no application to a case where wholly independent of any claim of the unconstitutionality of the tax sought to be enjoined, additional equities sufficient to sustain jurisdiction are alleged, and this, it is asserted, being such a case, falls within the exception to the general rule. But conceding for argument's sake only the legal premise upon which the contention rests, we think the conclusion that this case falls within such exception is wholly without merit, since after an examination of the complaint we are of the opinion that no ground for equitable jurisdiction is alleged. It is true the complaint contains averments that unless the taxes are enjoined many suits by other persons will be brought for the recovery of the taxes paid by them, and also that by reason of Rev. Stat., § 3187, making the tax a lien on plaintiffs' property the assessment of the taxes would constitute a cloud on plaintiffs'

title. But these allegations are wholly inadequate under the hypothesis which we have assumed solely for the sake of the argument, to sustain jurisdiction, since it is apparent on their face they allege no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced—allegations which if recognized as a basis for equitable jurisdiction would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute and thus render it nugatory, while it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.

There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes and giving a right to sue in case of his refusal to refund are wanting in due process and therefore there is jurisdiction. But we think it suffices to state that contention to demonstrate its entire want of merit.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

DODGE *v.* BRADY, COLLECTOR OF INTERNAL REVENUE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 213. Argued October 14, 15, 1915.—Decided February 21, 1916.

Under the exceptional conditions of this case, while there may have been ground for the District Court dismissing it for lack of jurisdiction, as there was a basis for taking jurisdiction and the decision was clearly right on the merits, this court does not reverse, but

affirms the judgment which put an end to an absolutely useless controversy.

Brushaber v. *Union Pac. R. R. Co.*, *ante*, p. 1, followed to effect that the Income Tax Law of 1913 is not unconstitutional in any of the respects involved in that or this action.

THE facts, which involve the constitutionality and application of the Income Tax Law of 1913, are stated in the opinion.

Mr. William D. Guthrie, with whom *Mr. Fred A. Baker* was on the brief, for appellant:

The whole of the Income Tax provision of the Tariff, subd. 2, div. A, of § 2 of the Act of October 3, 1913, is unconstitutional, because of the invalidity of the provisions: (1) subjecting stockholders in corporations, when computing their surtaxes to liability for the gains and profits of the corporations which have not been divided or distributed; (2) vesting in the Secretary of the Treasury an arbitrary power of determining, without notice, or a hearing, whether any corporation has accumulated a greater undivided surplus than is reasonable for the needs and purposes of the business; and (3) permitting corporations to accumulate and withhold from surtax taxation such part of their gains and profits as may be reasonably necessary for the needs and purposes of the business, and in not according such great business privilege to individuals and partnerships.

The provisions levying a graduated surtax on the incomes of individuals in excess of $20,000 without levying the same on the incomes of corporations in excess of $20,000 are unconstitutional and void.

Classifying incomes according to their sources and levying different rates on the several classes has objectionable features and consequences which do not pertain to that classification which is permissible in levying duties, imposts and excises.

In support of these contentions, see *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Cooley* v. *Granville*, 10 Cush. 53; *DeBarry* v. *Dunne*, 162 Fed. Rep. 961; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Georgia R. R.* v. *Wright*, 207 U. S. 127–138; *Grier* v. *Tucker*, 150 Fed. Rep. 658; *Howell* v. *Bristol*, 8 Bush, 493; *Hooper* v. *Emery*, 14 Maine, 375; *Lexington* v. *McQuillan*, 9 Dana (Ky.), 513; *Loan Association* v. *Topeka*, 20 Wall. 655; *Louis. & Nash. R. R.* v. *Stock Yards*, 212 U. S. 132, 144; *McCoach* v. *Minehill Co.*, 228 U. S. 295; *Mo. Pac. Ry.* v. *Nebraska*, 164 U. S. 403, 417; *Norwood* v. *Baker*, 172 U. S. 269; *People* v. *Brooklyn*, 4 N. Y. 420; *Pollock* v. *Farmers' L. & T. Co.*, 158 U. S. 601; *Roller* v. *Holly*, 176 U. S. 398, 409; *Schwerzchild* v. *Rucker*, 143 Fed. Rep. 656; *Sears* v. *Cottrell*, 5 Michigan, 251; *Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333; *State* v. *Township*, 36 N. J. L. 66; *State* v. *Travellers' Ins. Co.*, 73 Connecticut, 255; *Southern Ry.* v. *Greene*, 216 U. S. 400, 417; *Stratton's Independence* v. *Howbart*, 231 U. S. 414; *Stuart* v. *Palmer*, 74 N. Y. 183, 188; *Sutton* v. *Louisville*, 5 Dana (Ky.), 28, 31; *United States* v. *Whitridge*, 231 U. S. 144; *Weeks* v. *Milwaukee*, 10 Wisconsin, 242; *Water Co.* v. *Wade*, 59 N. J. L. 78.

The Solicitor General and *Mr. Assistant Attorney General Wallace* for appellee.[1]

Mr. Chief Justice White delivered the opinion of the court.

The appellants are the same persons who sued in *Dodge* v. *Osborn*, just decided, *ante*, p. 118. After the dismissal of that suit by the Supreme Court of the District of Columbia for want of jurisdiction the parties, on June 10, 1914, filed their bill in the court below against the Collector

[1] For abstract of argument in this and other cases argued simultaneously herewith, see p. 5, *ante*.

of Internal Revenue to enjoin the collection of the surtaxes assessed against them which were disputed in the previous case on substantially the same grounds alleged in the complaint in that case. The bill alleged, however, that plaintiffs had filed with the Collector "an appeal or claim for the remission and abatement of the surtaxes" because of the unconstitutionality of the statute imposing them and that the Commissioner of Internal Revenue to whom the claim had been forwarded by the Collector had such protest under advisement. Upon the filing of the bill the plaintiffs moved for a preliminary injunction which was denied July 29, 1914. On the same day by leave of court a supplemental bill was filed which alleged that since the filing of the original bill the Commissioner of Internal Revenue had ruled adversely upon plaintiffs' protest and that thereupon they had paid the surtaxes to the Collector under protest, and they prayed a recovery of the amount paid to the Collector and for the other relief asked in the original bill. The defendant moved to dismiss the bill for want of jurisdiction because the suit was brought to enjoin the collection of a tax contrary to the provisions of Rev. Stat., § 3224, and for want of equity because the Income Tax Law was constitutional and valid. The court sustained the motion on the latter ground and dismissed the bill on the merits and the case is here on direct appeal because of the constitutional questions.

The Government insists that the court below was without jurisdiction to decide the merits and we come first to that question. It is apparent if the original bill alone is taken into view that the suit was brought to enjoin the collection of a tax and the court was without jurisdiction for the reasons stated in the previous case. And it is argued by the Government that there was no jurisdiction under the supplemental bill since it fails to allege that an appeal was taken to the Commissioner of Internal Revenue after the payment of the taxes and that he refused

to refund them and therefore fails to allege a compliance with the conditions imposed by §§ 3220 and 3226 of the Revised Statutes as prerequisites to a suit to recover taxes wrongfully collected. But broadly considering the whole situation and taking into view the peculiar facts of the case, the protest to the Commissioner and his exertion of authority over it and his adverse ruling upon the merits of the tax, thereby passing upon every question which he would be called upon to decide on an appeal for a refunding of the taxes paid, we think that this case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits, thus putting an end to further absolutely useless and unnecessary controversy. We say useless and unnecessary because on the merits all the contentions urged by the appellants concerning the unconstitutionality of the law and of the surtaxes which it imposes have been considered and adversely disposed of in *Brushaber* v. *Union Pacific R. R.*, *ante*, p. 1.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

INNES *v.* TOBIN, SHERIFF OF BEXAR COUNTY, TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 532. Argued January 6, 1916.—Decided February 21, 1916.

Prior to adoption of the Constitution, fugitives from justice were surrendered between the States conformably to what were deemed to be the controlling principles of comity.

It was intended by Art. IV of the Constitution to fully embrace the subject of rendition of fugitives from justice between the States and to confer authority upon Congress to deal with that subject.

The Act of February 12, 1793, c. 7, 1 Stat. 302, now Rev. Stat., § 5278, was enacted for the purpose of controlling the subject of interstate rendition and its provisions were intended to be dominant and, so far as they operated, controlling and exclusive of state power.

Construed in the light of the principles which the statute embodies, the provisions of Rev. Stat., § 5278, expressly or by necessary implication, prohibit the surrender in one State for removal as a fugitive from justice to another State of a person who clearly was not and could not have been such a fugitive from the demanding State.

The doctrine of asylum applicable under international law by which a person extradited from a foreign country cannot be tried for an offense other than the one for which the extradition was asked does not apply to interstate rendition.

Where there is nothing in the record of a *habeas corpus* proceeding to show that the person held for surrender under interstate rendition had not been in the demanding State there is no basis for this court assuming that the rendition order conflicted with Rev. Stat., § 5278, in that respect because the record did show that such person had come into the surrendering State from a State other than the one demanding.

An Act of Congress which leaves a subject with which Congress has power to deal under the Constitution unprovided for does not necessarily take the matters within the unprovided area out of any possible state action; and so held that the exclusive character of § 5,278, Rev. Stat., does not relate to the rendition between States of criminals found in, but who had not fled to, the surrendering State but had been involuntarily brought therein.

In construing an Act of Congress, this court will not presume that because its provisions were not coterminous with the power granted by Congress, it was so framed for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or National.

THE facts, which involve the construction of the provisions in the Federal Constitution relative to intrastate rendition and the constitutionality, construction and application of § 5278, Rev. Stat., providing for such rendition, are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. R. H. Ward* was on the brief for plaintiff in error:

Under the admitted facts, plaintiff in error was not a fugitive from justice within the meaning of the Act of Congress, and § 2, Art. 4, Const. of U. S. is not self-executing. *Hyatt* v. *Corkran*, 188 U. S. 691; *Kentucky* v. *Denison*, 24 How. 66; *Roberts* v. *Reiley*, 116 U. S. 80.

Section 5278, Rev. Stat., is plain and unambiguous. It contemplates that in order to be a fugitive from justice, there must have been a voluntary flight, as it speaks of a demand of the executive of a state for the surrender of a person as a fugitive from justice by the executive authority of a State to which such person has fled, and it provides that the indictment or affidavit must be certified as authentic by the Governor of the State from whence the person, so charged, has fled, etc., and it makes it the duty of the executive authority of the State to which such person has fled, to cause him to be arrested and secured. See *Hyatt* v. *New York*, 188 U. S. 691.

To constitute one a fugitive, there must be a flight and it does violence to the language of the statute, to hold that a person has fled into a State, when he is brought into such S ate by force, involuntarily, against his will, and by the strong arm of the law. Spear on Extradition 338–571; 2 Moore on Extradition, § 569.

A person forcibly brought into a State from a sister State is entitled to his discharge upon *habeas corpus*. See also *North Carolina* v. *Hall*, 28 L. R. A. 292; *Tennessee* v. *Jackson*, 26 Fed. Rep. 258; *Ex parte Thaw*, 214 Fed. Rep. 423; 2 Moore, page 920; *In re Robinson*, 29 Nebraska, 135; *State* v. *Simmons*, 39 Kansas, 262; *State* v. *Hall*, 40 Kansas, 338; *Re Cannon*, 47 Michigan, 481; *Ex parte McKnight*, 48 Oh. St. 588; *Ex parte Todd*, 12 S. Dak. 386.

Mr. Hugh M. Dorsey, with whom *Mr. C. C. McDonald* was on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The Governor of Oregon honored a requisition made by the Governor of Texas for the delivery of the plaintiff in error for removal to Texas as a fugitive from the justice of that State. The accused was taken to Texas, tried for murder and a conspiracy to commit murder and acquitted. She was, however, not released from custody because she was ordered by the Governor of Texas under a requisition of the Governor of Georgia, to be held for delivery to an agent of the State of Georgia for removal to that State as a fugitive from justice.

Alleging these facts, an application for release by *habeas corpus* was then presented to a state court upon the charge that the extradition proceedings and the warrant of removal thereunder were "wholly null and void" because "your petitioner was never a fugitive from justice from the State of Georgia to the State of Texas within the meaning and intent of the laws of the United States regulating extradition proceedings." On the return to the writ, the court, finding the facts to be as above stated, refused to discharge the petitioner and the case is

before us to review a judgment of the Court of Criminal Appeals which adopted the findings of the trial court and affirmed its action.

All the Federal questions involve the meaning of § 2 of Article IV of the Constitution which is as follows: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime;" they also depend on § 5278 of the Revised Statutes which is but a reproduction of § 1 of the act of February 12, 1793 (Chap. 7, § 1, 1 Stat. 302), giving effect to and establishing the methods of procedure to be resorted to for the purpose of enforcing the provisions of the Constitution on the subject to the extent that their execution was by the statute provided for.

Broadly there is but a single question for consideration, Was the order for rendition repugnant to the Constitution and the provisions of the statute? But two inquiries are involved in its solution: First, was the rendition order void because under the facts there was no power to award it except by disregarding express prohibitions or requirements of the Constitution or statute or by necessary implication adversely affecting rights thereby created; and second, even although this was not the case, was the order nevertheless void because under the circumstances it dealt with a situation which by the effect of the statute was taken out of the reach of state authority even although no express provision was made in the statute for dealing with such condition by any authority, state or Federal? We consider the two inquiries under separate headings.

First. For the purpose of the solution of the inquiry under this heading we treat the following proposition as beyond question: (a) That prior to the adoption of the

Constitution fugitives from justice were surrendered between the States conformably to what were deemed to be the controlling principles of comity. *Kentucky* v. *Dennison*, 24 How. 66, 101, 102; 2 Moore on Extradition and Interstate Rendition, p. 820 *et seq.* (b) That it was intended by the provision of the Constitution to fully embrace or rather to confer authority upon Congress to deal with such subject. *Prigg* v. *Pennsylvania*, 16 Pet. 539; *Kentucky* v. *Dennison, supra; Taylor* v. *Taintor*, 16 Wall. 366; *Appleyard* v. *Massachusetts*, 203 U. S. 222. (c) That the act of 1793 (now Rev. Stat., § 5278) was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and that its provisions were intended to be dominant and so far as they operated controlling and exclusive of state power. *Prigg* v. *Pennsylvania, supra; Kentucky* v. *Dennison, supra*, pp. 104, 105; *Mahon* v. *Justice*, 127 U. S. 700; *Lascelles* v. *Georgia*, 148 U. S. 537.

Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State. *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Hyatt* v. *Corkran*, 188 U. S. 691; *Bassing* v. *Cady*, 208 U. S. 386, 392.

From this it results that the first inquiry here is, did it appear that the accused was a fugitive from the justice of the State of Georgia? While the facts which we have stated do not disclose affirmatively that she was ever in Georgia and the date, if at all, of her flight from that State, we think that she was such a fugitive is to be assumed for three obvious reasons: because there was no question of such fact made in the application for *habeas corpus* since it is apparent on the face of the application that the ground of relief relied upon was not that there had

been no flight from Georgia, but that there was and could have been no flight into Texas since the coming into that State was involuntary and resulted solely from the extradition proceedings; because that view of the subject was assumed, both in the elaborate opinion of the court below and that of the dissenting judge, to be unquestioned; and finally because neither in the assignments of error in this court nor in the arguments pressed upon our attention is the contrary view insisted upon or even suggested. From that aspect, therefore, there is no ground for saying that the extradition order conflicted with the express provision of the statute.

Was there a conflict between the statute and the order for removal to Georgia arising by necessary implication from the fact that the accused had been brought into the State of Texas on a requisition upon the State of Oregon and had not been released from custody or been returned to Oregon, is the only remaining question under this heading. While it is quite true, as pointed out in the opinion of the court below, and in that of the judge who dissented, that there are some decided cases and opinions expressed by text writers which sustain the affirmative view of this inquiry, the subject is here not an open one since it has been expressly foreclosed by the decision in *Lascelles* v. *Georgia*, 148 U. S. 537. In that case the issue for decision was whether a person accused who had been removed to the State of Georgia from another State on extradition proceedings for trial for a specified crime was liable in Georgia to be tried for another and different crime. Reviewing the whole subject and calling attention to the broad lines of distinction between international extradition of fugitives from justice and interstate rendition of such fugitives under the Constitution and the provisions of the act of Congress and the error of assuming that the doctrine of asylum applicable under international law to the one case was applicable to the other, it was

held that the right to prosecute for such other offense existed. The court said (p. 542): "Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offences committed in the State from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to *all* crimes and offences punishable by the laws of the State where the act is done. *Kentucky* v. *Dennison*, 24 How. 66, 101, 102; *Ex parte Reggel*, 114 U. S. 642."

We are thus brought to the remaining heading, which is,

Second. Although the order for rendition was not in conflict either expressly or by necessary implication with any of the provisions of the Constitution or statute, was it nevertheless void under the circumstances because it dealt with a subject with which it was beyond the power of the State to deal and which was therefore brought as the result of the adoption of the statute within exclusive Federal control although no provision dealing with such subject is found in the statute? To appreciate this question, the proposition relied upon needs to be accurately stated. It is this: The Constitution provides for the rendition to a State of a person who shall have fled from justice and be found in another State, that is, for the surrender by the State in which the fugitive is found. This, it is conceded, would cover the case and sustain the authority exercised, as the accused was a fugitive from the justice of Georgia and was found in Texas. But the proposition insists that the statute is not as broad as the Constitution since it provides not for the surrender of the fugitive

by the State in which he is found but only for his surrender by the State into which he has fled, thus leaving unprovided for the case of a fugitive from justice who is found in a State but who has not fled into such State because brought into such State involuntarily by a requisition from another. And the argument is supported by the contention that as the statute exercises the power conferred by the Constitution and is exclusive, it occupies the whole field and prohibits all state action even upon a subject for which the statute has not provided and which therefore in no manner comes within its express terms. But we are of the opinion that the contention rests upon a mistaken premise and unwarrantedly extends the scope of the decided cases upon which it relies. The first, because it erroneously assumes that although the statute leaves a subject with which there was power to deal under the Constitution unprovided for, it therefore took all matters within such unprovided area out of any possible state action. And the second, because while it is undoubtedly true that in the decided cases relied upon (*Kentucky* v. *Dennison*, *supra*; *Roberts* v. *Reilly*, *supra*; *Hyatt* v. *Corkran*, *supra*) the exclusive character of the legislation embodied in the statute was recognized, those cases when rightly considered go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly or by necessary implication provided.

No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute in not making its provisions exactly coterminous with the power granted by the Constitution did so for the purpose of leaving the subject so far as unprovided for beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to

extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt. This becomes manifest when it is considered that if the proposition now insisted upon were accepted, it would follow that the delivery of a criminal who was a fugitive from justice by one State on a requisition by another would exhaust the power and the criminal, therefore, whatever might be the extent and character of the crimes committed in other States, would remain in the State into which he had been removed without any authority to deliver him to other States from whose justice he had fled. And this, while paralyzing the authority of all the States, it must be moreover apparent, would cause them all to become involuntary asylums for criminals, for no method is suggested by which a criminal brought into a State by requisition if acquitted could be against his will deported, since to admit such power would be virtually to concede the right to surrender him to another State as a fugitive from justice for a crime committed within its borders.

It follows from what we have said that the court below was right in refusing to discharge the accused and its judgment therefore must be and it is

Affirmed.

By stipulation of counsel a similar judgment will be entered in case of *Victor E. Innes* v. *Tobin, Sheriff*, No. 533.

TITLE GUARANTY AND SURETY COMPANY *v.* STATE OF IDAHO FOR THE USE OF ALLEN.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 815. Motion to dismiss or affirm submitted January 24, 1916.—Decided February 21, 1916.

Where the State, suing on behalf of depositors of a bank, is an actual party plaintiff, the case cannot be removed to the Federal court. *Missouri &c. Ry.* v. *Commissioners*, 183 U. S. 53.

Where a State, suing on behalf of depositors of a bank, is merely a nominal party, the case cannot be removed if none of the distinct judgments to be rendered in favor of any individual is large enough to confer jurisdiction: the amounts cannot be aggregated for that purpose. *Rogers* v. *Hennepin County*, 239 U. S. 621.

The due process provision of the Fourteenth Amendment does not prevent a State from placing upon a bank commissioner the duty of closing a bank found upon examination to be insolvent without first instituting proceedings and obtaining an award.

THE facts, which involve the right of removal of a cause from the state court to the Federal court on grounds of diversity of citizenship and of amount in controversy and the constitutionality under the due process provision of the Fourteenth Amendment of certain provisions of the Idaho Banking Law, are stated in the opinion.

Mr. Joseph H. Peterson, Attorney General of the State of Idaho, *Mr. Paris Martin* and *Mr. William E. Cameron* in support of the motion to dismiss or affirm.

Mr. John F. Nugent, *Mr. Samuel H. Hays* and *Mr. P. B. Carter* for plaintiff in error in opposition to the motion:

The action is brought by the State of Idaho for the use and benefit of some two hundred and eighteen persons who were depositors in the Boise State Bank and while no individual item is in excess of $3,000 the total amount is $30,000.

The judgment, therefore, is a judgment in favor of the State for the use and benefit of certain individuals in the aggregate amounting to over $30,000, and while no individual item is in excess of $3,000, the total amount is over $30,000.

Under § 4092, Idaho Rev. Codes, the State is the trustee of an express trust under this bond and may therefore properly sue without joining the persons for whose benefit the action is prosecuted. For this reason the State brings a single action for the entire amount and not upon the ground of convenience or economy. See *Troy Bank* v. *Whitehead*, 222 U. S. 39.

There is no case exactly like the one at bar. The bond was the common security of all of the persons for whose benefit the action was brought.

There was only one breach of the bond and there was only one default or neglect of duty.

The claims sued on were not united for convenience and economy in the sense in which that phrase is used in the decisions of this court, but were united entirely on the ground that the State was the proper plaintiff in the suit under the specific statute which made the presence of the beneficiaries unnecessary.

The State is seeking to recover the entire fund deposited. The aggregate amount, therefore, is to be taken in ascertaining the amount in controversy. *Handley* v. *Stutz*, 137 U. S. 366. See also, *Balt. & Ohio R. R.* v. *United States*, 220 U. S. 94; *Kaus* v. *Am. Surety Co.*, 199 Fed. Rep. 972; *Spokane Co.* v. *Kootenai Co.*, 199 Fed. Rep. 481; *Jones* v. *Mutual Fidelity Co.*, 123 Fed. Rep. 506.

The plaintiff is the State of Idaho, but is only a nominal party; therefore, the question of citizenship is that of the real parties in interest, and as they are citizens of Idaho, and as the defendants are citizens of other States jurisdiction exists. *New Orleans* v. *Whitney*, 138 U. S. 595; *Mex. Cent. Ry.* v. *Eckman*, 187 U. S. 429.

The judgment cannot be divided up into parts to defeat jurisdiction on the question of the amount in controversy.

No objection to the verification of the petition for removal was made at the time of the trial, and the order denying the petition was made on the merits. The verification was sufficient. *Cropsey* v. *Sun P. & P. Ass'n*, 215 Fed. Rep. 132; *Murray* v. *South. Bell Tel. Co.*, 210 Fed. Rep. 925; *Porter* v. *Nor. Pac. Ry. Co.*, 161 Fed. Rep. 773.

The constitutional question, to-wit, § 73 of the Idaho Banking Act was unconstitutional in that it did not provide for due process of law, was urged and decided adversely to the plaintiff in error.

Section 73 does not provide for any notice to the bank or any judicial proceedings whatever in determining the insolvency of the bank, or whether or not it had paid its depositors in the ordinary course of business, and in that respect is unconstitutional as denying due process of law in providing for a hearing. *C., M. & St. P. R. R.* v. *Minnesota*, 134 U. S. 418.

A state bank is in a different position from a National bank. The National banks are instrumentalities of the Federal Government created for a public purpose and as such necessarily subject to the paramount authority of the United States. They are in a sense a part of the treasury department. State banks occupy no such relation to state affairs. There is no arbitrary right of a bank commissioner to close state banks nor is there any statute in Idaho similar to the Federal Act.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The case is before us on a motion to dismiss or affirm. The action of the court below which it is sought to review affirmed a judgment of the trial court entered on the verdict of a jury in a suit brought by the State for the use and benefit of O. W. Allen and two hundred and eighteen other named depositors of the Boise State Bank against Platt, a state bank commissioner, and the surety on his bond, for losses alleged to have been suffered by each of the individuals named as the result of alleged neglect of official duty imposed by the state law upon the bank commissioner. The wrong relied upon was his alleged misconduct in not closing the doors of the bank and permitting it to continue business after he had discovered, as the result of an official examination, that the bank was hopelessly insolvent. The bill as a first cause of action fully set out the facts and stated the legal grounds relied upon to establish the loss and right of O. W. Allen to recover, and separate causes of action were then stated in favor of each of the two hundred and eighteen other depositors. There was an application to remove the case to the District Court of the United States on the grounds of diverse citizenship, the depositors named being citizens of Idaho and Platt the bank commissioner, being then a resident of California and the Surety Company of Pennsylvania, which application was denied. After issue joined there was a trial before a jury and a verdict in favor of the plaintiff, the State, and against the defendants "on each and every cause of action set forth in the complaint herein, to and for the use and benefit of each of the parties named in each of the separate causes of action set forth in plaintiff's complaint." And it was conformably adjudged "that the said plaintiff do have and recover of and from the said defendants . . . for the

use and benefit of each of the following-named parties, the sums set opposite their respective names, to wit," etc. No one of the amounts thus awarded to the plaintiff for the use of any one of the named persons equalled three thousand dollars, but the sum of all the claims equalled thirty thousand dollars. In affirming the judgment the court below held that the relief prayed was authorized by the state statutes and that they also conferred authority upon the State to bring the suit as an express trustee for the use and benefit of the respective parties.

The Federal questions relied upon are first, the alleged wrongful denial of the right to remove, and second, an asserted error committed by the court below in refusing to sustain a claim under the due process clause of the Fourteenth Amendment.

The first is plainly without merit. Treating the State as the party plaintiff, it is not open to question that there was no right to remove. *Stone* v. *South Carolina*, 117 U. S. 430; *Missouri &c. Ry.* v. *Missouri R. R. Commissioners*, 183 U. S. 53, 58. And if we were to accede to the contention made in argument that the State must be treated as merely a nominal party and the right to remove be then determined by the citizenship of the individuals for whose benefit recovery was allowed, it would yet follow, since none of the distinct judgments in favor of any of the individuals are large enough to confer jurisdiction, that the court below correctly held that there was no basis for the right to remove. *Woodside* v. *Beckham*, 216 U. S. 117; *Troy Bank* v. *Whitehead*, 222 U. S. 39; *Rogers* v. *Hennepin County*, 239 U. S. 621. In fact the correctness of these conclusions is made clear by the arguments advanced to the contrary, since they serve only to confuse and are destructive of each other. Thus, on the one hand, for the purpose of establishing the existence of diversity of citizenship justifying the removal it is urged that the State must be treated as merely a nominal party having

no interest and as in no wise concerned in the judgment, and then upon the hypothesis that the State is eliminated, in order to establish a jurisdictional amount sufficient to remove, the award of distinct and separate amounts made by the judgment in favor of each of the distinct plaintiffs is wholly ignored and it is urged that there is but one judgment which is in favor of the State and which is composed of the aggregate of the distinct amounts.

Second. The proposition under the Fourteenth Amendment relied upon is that consistently with that Amendment the State had not the power to put upon the bank commissioner the duty of closing the bank in case on examination it was found to be insolvent, since such authority consistently with due process could only have been exerted after judicial proceedings to ascertain the facts and the awarding of relief accordingly. The pleadings leave it exceedingly doubtful whether the question thus urged was presented in either of the courts below, and it is besides obvious from the opinion of the court below that it considered that the only question raised under the Constitution of the United States was a contention that there would result a want of due process if the state statutes conferred upon an administrative officer the authority to liquidate the affairs of the insolvent bank without judicial proceedings. We say this because in its opinion the court observed that if that was the contention, it was irrelevant, as the statutes did not authorize liquidation except as a result of judicial proceedings, although they did impose upon the bank commissioner the duty, after he found a bank to be insolvent, to close its doors and prevent the further transaction of business until, in the orderly course of procedure, a judicial liquidation might be accomplished. But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the Fourteenth Amendment because

power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Shallenberger* v. *First State Bank*, 219 U. S. 114.

Dismissed for want of jurisdiction.

BANNING COMPANY *v.* PEOPLE OF THE STATE OF CALIFORNIA UPON THE INFORMATION OF WEBB, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 73. Argued January 19, 1916.—Decided February 21, 1916.

The withdrawal from sale of lands by a State before any right is consummated, does not amount to the impairment of the obligation of a contract within the meaning of Article I, § 10 of the Federal Constitution.

While an offer made by a State, though no particular person be designated, and accepted, may constitute a contract protected by the Federal Constitution, the offer and acceptance must have the characteristics of a bargain and be conventional counterparts.

Where a State makes a general offer to sell and provides for contest and determination of conflicting claims of parties contending for the right to purchase, the State is not bound by its offer or precluded from withdrawing it, until the rightful claimant is determined and his right of purchase perfected by payment of at least an installment of the price thereof.

Expenditures, other than payment to the State, by one intending to accept a general offer of a State to sell public lands are but voluntary

qualifications to become a purchaser and are not binding on him to proceed to purchase or on the State to wait for him to purchase.

Although the statute of California of 1863 gave private parties the right to acquire tide lands under certain conditions, the right was abrogated by later statutes and the constitution of 1879, and such abrogation was not unconstitutional under the contract clause of the Constitution as to one who had not paid any part of the purchase price prior thereto.

169 California, 542, affirmed.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of legislation of California and provisions of the constitution of 1879 withdrawing state lands from sale, are stated in the opinion.

Mr. James A. Gibson, with whom *Mr. Edward E. Bacon* was on the brief, for plaintiffs in error:

The proceedings for purchase taken by Phineas Banning in 1866, under the act of 1863, created a contract with the State of California for the purchase of the land in accordance with that act, which could not be impaired by any subsequent legislative action.

The State's offer to sell was accepted by filing application to purchase and this consummated a binding contract.

The decisions relied on under preëmption laws can be distinguished, and do not involve doctrine of contract by offer and acceptance.

Sufficient consideration for State's contract is found in expenditures on the faith of the offer, and implied promise by the applicant to pay the purchase price.

Prior decisions of the California court are not binding on this court, nor even persuasive as authority.

The contract by offer and acceptance has been sustained by numerous decisions under the contract clause of the Federal Constitution.

The judgment rendered by the District Court in the

contest proceedings in 1879 conclusively established the contract right of Phineas Banning to purchase the land in suit and that right constituted property of which he could not be deprived by subsequent legislation without violating both the contract clause and the due process clause of the Federal Constitution.

None of the legislation intermediate the act of 1863 and the constitution of 1879 should be construed as affecting the rights of an applicant under the former act to complete his proceedings for purchase in accordance therewith.

In support of these contentions, see *Am. Exp. Co.* v. *Mullins*, 212 U. S. 311; *Blair* v. *Chicago*, 201 U. S. 400; *Water Co.* v. *Boise City*, 230 U. S. 84; *Campbell* v. *Wade*, 132 U. S. 34; *Frisbie* v. *Whitney*, 9 Wall. 187; *Grand Trunk Ry.* v. *South Bend*, 227 U. S. 544; *Hall* v. *Wisconsin*, 103 U. S. 5; *Hendrick* v. *Lindsay*, 93 U. S. 143; *Louisiana R. R.* v. *Behrman*, 235 U. S. 164; *Louisville* v. *Cumberland Tel. Co.*, 224 U. S. 649; *McCullough* v. *Virginia*, 172 U. S. 102; *New York Elec. Co.* v. *Empire City Co.*, 235 U. S. 179; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co.* v. *Rivers*, 115 U. S. 674; *Nor. Pac. R. R.* v. *DeLacey*, 174 U. S. 622; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Russell* v. *Sebastian*, 233 U. S. 195; *Tarpey* v. *Madsen*, 178 U. S. 215; *Telfener* v. *Russ*, 145 U. S. 522; *United States* v. *Klein*, 13 Wall. 128; *U. S. Fidelity Co.* v. *United States*, 209 U. S. 306; *Walla Walla* v. *Water Co.*, 172 U. S. 1; *Yosemite Valley Case*, 15 Wall. 77; *McConnaughy* v. *Pennoyer*, 43 Fed. Rep. 196; *Anthony* v. *Jillson*, 83 California, 296; *Buckley* v. *Howe*, 86 California, 596; *Cadierque* v. *Duran*, 49 California, 356; *Christman* v. *Brainerd*, 51 California, 534; *Cunningham* v. *Shanklin*, 60 California, 118; *Cushing* v. *Keslar*, 68 California, 473; *Dillon* v. *Saloude*, 68 California, 267; *Garfield* v. *Wilson*, 74 California, 175; *Goldberg* v. *Thompson*, 96 California,

117; *Hinckley* v. *Fowler*, 43 California, 56; *Lobree* v. *Mullan*, 70 California, 150; *McFaul* v. *Pfankuch*, 98 California, 400; *Perri* v. *Beaumont*, 91 California, 30; *Tyler* v. *Houghton*, 25 California, 27; *Wright* v. *Langenour*, 55 California, 280; *Youle* v. *Thomas*, 146 California, 537.

Mr. Albert Lee Stephens and *Mr. J. A. Anderson*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, and *Mr. W. H. Anderson* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Suit brought by the State of California to quiet title to certain lands embraced in a patent issued under certain statutes of the State authorizing the sale of tide lands.

The lands involved constituted location No. 57 of the state tide lands, and the State alleged that they had been at all times a portion of the inner bay of San Pedro and below the line of ordinary high tide; that they were partly within the limits of the City of San Pedro and partly within the limits of Wilmington; that prior to and since 1870 no portion of them had ever been reclaimable for agricultural or other purposes and that the State had at all times withheld them from sale.

The intermediate pleadings we may omit. The defendants (plaintiffs in error here) filed separate answers, the pertinent parts of which may be summarized as follows: They denied the title of the State, the location of the lands as alleged or their relation to the cities of San Pedro and Wilmington, or that they were not susceptible of reclamation for agricultural purposes or that they had been withheld from sale by the State.

For an affirmative defense it was alleged that one Phineas Banning, in February, 1866, made application to the

State under an act of its legislature for the disposition of state lands to purchase the lands in controversy; that he possessed the qualifications to apply to purchase the lands and on February 15, 1866, did apply to purchase them under an act of the legislature providing for their sale approved April 27, 1863, and in conformity to his application and the provisions of § 7 of that act caused a survey of the lands to be made and a plat and field notes thereof to be completed by the county surveyor of Los Angeles County and paid a large sum of money to such surveyor April 2, 1866, for legal fees; that he caused a copy of his application and affidavit to be filed in the office of the surveyor general of the State February 15, 1866; that on said date he subscribed the oath required by § 28 of the act of 1863 and complied with § 29; that by reason of such proceedings he acquired the title to the lands and a contract was created between him and the State whereby the State agreed to sell him the lands upon the terms provided in the act of 1863. That he complied with all other provisions of the act and of other acts, and that a patent was duly issued to him and the title thereby conveyed to him and by him conveyed to defendants. That the State by this action is attempting to impair the obligation of the contract between the State and Banning in violation of Article I, § 10, of the Constitution of the United States.

That subsequently other applications were made to purchase other lands in the vicinity of location No. 57 which overlapped and conflicted with that made by Banning; that one of said applicants, to-wit, one William McFadden, made a demand upon the surveyor general of the State that in pursuance of § 3413 of the Political Code of the State the contest between the applicants be referred to the proper court for judicial determination of the question as to which of the applicants was entitled to a patent from the State. That in accordance with

the requests the surveyor general referred the contest to the District Court of the Seventeenth Judicial District of the State in and for the County of Los Angeles and in pursuance thereof McFadden commenced an action against Banning and certain other parties and it was therein adjudged that Banning was entitled to purchase and to have a patent issued to him and that Banning was entitled to the approval of his survey and application as to all of the lands described in his amendatory application of January 2, 1878, except a certain described tract, and was entitled to comply with the further provisions of the law to purchase and receive a patent therefor.

That Banning, on April 5, 1880, paid the first installment on the purchase price of the land, and, on April 10, 1880, a certificate of purchase was issued to him whereby it was certified that he had in all respects complied with the law and was entitled to receive a patent; that subsequently, on December 14, 1881, another certificate was issued certifying that full payment had been made to the State and that the decree of the court in the contest proceedings had been fully complied with and that he was entitled to a patent, and thereafter on December 16, 1881, a patent was duly issued in accordance with the certificate and the decree of the District Court and duly recorded in the office of the recorder of Los Angeles County.

That the defendants have succeeded to the rights of Banning and have become vested with a fee simple title to the lands paramount to the claim of the State or of any person; that the State is estopped by the judgment of the District Court and the proceedings from claiming any right, title or interest in them or any of them and that the patent and proceedings are a bar to the claim of the State or of any one.

As a third defense §§ 312, 315, 316, 317, 318 and 319

of the Code of Procedure of the State were pleaded as a bar to the action.

The trial court found to be true the allegations of the State as to the character of the lands, their location within the inner harbor of San Pedro, and that, since 1870, they have been within two miles of the city of San Pedro and Wilmington, being partly within the limits of those cities.

The court also found the fact of the application of Banning as alleged, the conflict with McFadden, its reference to the District Court for decision, the decision and judgment rendered and the subsequent proceedings had, the payment of the purchase price of the lands and the issue of patent to Banning. It further found that the patent was void, that no title vested thereby to any land below ordinary high tide, that the State was not estopped by the judgment or the subsequent proceedings and that they did not bar the claims of the State, nor constitute an adjudication of the matters in controversy against the State or debar it from prosecuting this action. The court also decided against the bar of the sections of the Code of Procedure.

From these findings the court concluded and decreed that the State was the owner of the lands and that the defendants had not nor had either of them any estate or title in them. A motion for new trial was made and denied and on appeal the Supreme Court affirmed the judgment and order denying the new trial.

There is no dispute about the facts. Banning complied with the act of 1863 and subsequent acts concerning the sale of the lands and acquired title if they had the efficacy to convey it or were not suspended in their operation by subsequent legislation and by the constitution of the State adopted in 1879.[1] The Supreme Court denied in

[1] "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right

some respects such efficacy and decided that all of the right of Banning to acquire title to the lands was taken away by the constitution of 1879, and the legislation to which we shall presently refer.

We need not encumber the opinion with a detail of the statutes. It is conceded and the Supreme Court has decided that title could be acquired to the tide lands of the State under the act of 1863, and it is conceded that Banning proceeded regularly under that statute and acquired the title if other statutes or the constitution of 1879 did not intervene to prevent. It is upon the efficacy of the later statutes and the constitution that the questions in the case depend.

The specific contention of plaintiffs in error is that by the application to purchase the lands under the act of 1863, the expenditure of money in accordance with its provisions for a survey of the lands, the statute of 1868 and the Political Code, and the judgment in the McFadden contest, a contract between Banning and the State was made which the constitution of 1879 or subsequent statutes could not impair.

The opposing contention is that no inviolable right of purchase vested in Banning or contract occurred until the payment by him of the purchase price of the lands and that such payment was after the adoption of the constitution and legislation withdrawing the lands from sale. In other words, that the lands were withdrawn from sale before any right became consummated.

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of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." Article XV, § 2, p. 37.

The constitution of the State has special relevancy in regard to contentions not before us. We refer to and insert it only for the sake of completeness, it being referred to throughout the argument.

Some dates are necessary to be given: Banning's application was made in February, 1866. It was allowed to repose without attention until the contest initiated by McFadden in April, 1878, on account of McFadden's application that overlapped and conflicted with Banning's. Judgment was entered in this contest November 26, 1879. This judgment decided Banning's to be the prior right. He made a first payment on the lands March 5, 1880. The certificate was issued April 10, 1880, and a patent executed December 16, 1881. The constitution was adopted in 1879, as we have seen. And further, in 1872, the town of Wilmington was incorporated, and the Supreme Court held that by an act passed April 4, 1870, all lands within two miles of "'any town or village'" (Statutes of 1869–70, § 877) were excluded from sale. This provision was repeated in the Political Code of 1872, § 3488, p. 532. The act of incorporation of Wilmington was repealed in 1887 (Stats. 1887, 108, 109) but the court said, "If in point of law Wilmington was an incorporated town during the interval between the passage and repeal of the law, then all proceedings to purchase the lands in question taken in that interval would be invalid with respect to land within the two-mile limit." This being the law, and the lands lying within two miles of the limits of Wilmington as incorporated by the act of 1872, the court said, "the patent is void and all claims of any of the defendants thereunder are invalid."

We accept this construction of the act incorporating Wilmington and the effect of the act of April 4, 1870, and of § 3488 of the Political Code and the exclusion thereby of tide lands within two miles of Wilmington from sale; and we are brought to the short point of the effect of the application and proceedings under it by the payment of the first installment of the purchase price of the lands and the other acts relied on, whether they consummated

a contract between the State and Banning protected by the Constitution of the United States.

To support such conclusion plaintiffs in error cite *McConnaughy* v. *Pennoyer*, 43 Fed. Rep. 196, in which Judge Deady expressed the view of an Oregon statute which offered the lands of that State for sale that such an application was "a written acceptance of the offer of the State, in relation to the land of the State described therein," and they cite the same case in this court (140 U. S. 1, 18), where that view was pronounced forcible and might have been conclusive but for the opposing consideration that suggested itself that the bare application itself unaccompanied by the payment of any consideration partook of the nature of a preëmption claim under the laws of the United States, with reference to which it had been held that the occupancy and improvement of the land by the settler and the filing of the declaratory statement of such fact conferred no vested right as against the Government of the United States until all of the preliminary steps prescribed by law, including the payment of the price, were complied with. *Yosemite Valley Case*, 15 Wall. 77, and *Frisbie* v. *Whitney*, 9 Wall. 187, were cited. The court found it unnecessary to determine between those views.

The cited cases were approved in *Campbell* v. *Wade*, 132 U. S. 34, 37, 38, and their principle applied to statutes of the State of Texas, one offering land for sale and the other withdrawing it before the performance of the conditions which gave a right of purchase. These conditions were an application to the surveyor of the county in which the land was situated to survey the land and within sixty days after survey to file it in the General Land Office. Within sixty days after such filing, it was provided by the statute, it should be the right of the applicant to pay the purchase money and upon doing so to receive patent for the land. "But for this declaration of the act," this

court said, by Mr. Justice Field (p. 37) "we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State."

Considering the same statute in *Telfener* v. *Russ*, 145 U. S. 522, 532, it was said that the right was "designated in the decision of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation."

Plaintiffs in error cite *Nor. Pac. Ry.* v. *DeLacy*, 174 U. S. 622, as in some way modifying the doctrine of the *Yosemite Valley Case* and of *Frisbie* v. *Whitney*. That case involved the question whether a claim of preëmption had under the circumstances stated in the case so far attached to the land in controversy that it did not pass under a grant to the railroad company as land to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights." It was held to have so passed; in other words, that the claim had not attached to the land, DeLacy not having performed the conditions of its preëmption. The case has no value in the solution of the questions presented by the case at bar. Nor have the other cases cited by plaintiffs in error for the proposition that an offer made by a State, though no particular person be designated, and accepted, constitutes a contract which will be protected by the Federal Constitution. The proposition in its generality may be admitted. Its illustration and application in the cited cases it would protract this opinion unnecessarily to detail. It is enough to say that the cases are not apposite. The offer and acceptance must have the characteristics of a bargain, must be conventional counterparts, as in the cited cases, and of which we may say generally franchises were offered on one part and accepted on the other by the undertaking of works costly to construct and costly to maintain and from which the public derived great benefit.

But even in such case it was pointed out in *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379, 386, that the offer of a State does not necessarily imply a contract. It may be of encouragement merely, "holding out a hope but not amounting to a covenant." The offer of the State was an exemption from taxation, and the asserted acceptance of the offer which was said to consummate a contract was the building of a railroad, and it was observed that the "building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." The "offer" and "acceptance" we held not to constitute a contract. This comment is applicable to the case at bar, and the Supreme Court of the State has decided, as we shall presently see, that the filing of the application does not constitute a binding contract upon the part of the applicant and the State.

But plaintiffs in error say that this court is not bound, against the invocation of the contract clause of the Constitution of the United States, by the decision of the Supreme Court of the State of California as to the construction and effect of the act of 1863 and subsequent legislation supplementing its provisions. *Louisiana R. & N. Co.* v. *New Orleans*, 235 U. S. 164; *New York Electric Lines* v. *Empire City Co.*, 235 U. S. 179. And they insist that the language of the act explicitly offered the lands for sale, which offer was accepted by Banning through his application, the oath taken by him and the expendi-

tures made by him, and that this construction has supporting strength from the judicial contest authorized by the act and that the judgment rendered in such contest was effective not only against the losing contestant but against the State as well.

If we apply the analogy of the preëmption laws we shall have to reject immediately the contention based on the proceedings aside from the judgment rendered upon a conflict of applications, and against the asserted effect of such judgment we have also the analogy of a conflict of claims under the mining laws of the United States. In other words, the State made an offer to sell, which might have been perfected into an inviolable right, and provided for a contest of conflicting claims, not as against itself, but as to the rights of the contending parties. The rightful claimant being determined and his right of purchase perfected, the State is then bound by its offer and is then and not until then precluded from legislation withdrawing it. And the right of purchase is perfected only by the payment of some installment of the purchase price of the land. It is only then that the State has received anything of value from the applicant. What he has done prior, the expenditures he has made, are but the qualifications to become a purchaser, not binding him to proceed, nor binding the State to wait for that which may never be done before it determines on other uses or disposition of the lands. And to wait might mean serious embarrassment. We have seen in the case at bar that Banning applied first in 1866. His application was permitted to repose in the files of the county or state officers until 1878, when activity upon it was provoked by another application.

Plaintiffs in error have been unable to cite a single decision in sanction of their contention. The Supreme Court refers to one (*Hinckley* v. *Fowler*, 43 California, 56, 63), decided in 1872, as possibly being urged to support it.

If we may venture to express our understanding of that case we should say that it is seriously disputable if it so decides. However, the court said that the case, so far as it announced such view, that is, "so far as it announces the rule that the filing of the application creates a contract binding on the state before any part of the price is paid, must be considered as overruled by the later decisions." *Messenger* v. *Kingsbury*, 158 California, 611, 615, and cases cited. Also *Polk* v. *Sleeper*, 158 California, 632. And these cases have become rules of property and factors in decision —indeed, would determine it, even if we had doubt of the construction of the applicable statutes, under the ruling of *Burgess* v. *Seligman*, 107 U. S. 20, and many subsequent cases.

A somewhat confused contention is made that by the act of March 28, 1868, and under the Political Code the rights of plaintiffs in error were preserved, and yet it seems to be contended that, though both act and code contain a provision excluding from their operation tide lands within two miles of any town or village, such provision is not applicable to lands theretofore applied for. The contentions we may suppose were rejected by the Supreme Court. And plaintiffs in error say that a decision either way cannot affect their "prior contention, that a binding contract of sale was created by the acceptance of the State's offer, through the filing in 1866 of the application to purchase under the act of 1863." Further discussion of the contentions is therefore unnecessary. Nor is further discussion of the effect of the judgment in the contest proceedings necessary. If by the incorporation of Wilmington in 1872 the act of April, 1870, and the Political Code of 1872 which excluded all tide lands within two miles of Wilmington became effective, the lands were withdrawn from sale and plaintiffs in error could have acquired no rights by proceedings subsequent to such incorporation. This, we have seen, was the judgment of

the Supreme Court of the State. The court had decided in prior cases that the State was not a party to the contest (*Cunningham* v. *Crowley*, 51 California, 128, 133); that the contest decided only the rights of the opposing parties (*Berry* v. *Cammet*, 44 California, 347; *Polk* v. *Sleeper*, *supra*).

The judgment undoubtedly is conclusive between the parties, determines their rights, as between themselves, and establishes the privilege to purchase the lands acquired by the prior application, even against the State "*so long as the statute remained in force*," to use the language of *Hinckley* v. *Fowler*, *supra*. This explanation may be given of all the cases cited by plaintiffs in error upon the effect of the judgment.[1] As long as the statute existed, rights could be acquired under it. Upon its repeal or limitation such opportunity was taken away.

Judgment affirmed.

CARNEGIE STEEL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 171. Argued January 21, 1916.—Decided February 21, 1916.

Ability to perform a contract is of its very essence, and delay resulting from absence of such ability is not due to unavoidable causes such as fires, storms, labor strikes, actions of the United States, etc., as enumerated in the contract involved in this action.

The fact that a contractor engaging to deliver armor plate of specified qualifications as to thickness, hardness, etc., was delayed by un-

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[1] *Cadierque* v. *Duran*, 49 California, 356; *Christman* v. *Brainerd*, 51 California, 534; *Wright* v. *Laugenour*, 55 California, 280; *Dillon* v. *Saloude*, 68 California, 267; *Cushing* v. *Keslar*, 68 California, 473; *Garfield* v. *Wilson*, 74 California, 175; *Anthony* v. *Jilson*, 83 California, 296, 299–300; *Goldberg* v. *Thompson*, 96 California, 117.

foreseen difficulties in the then new art of manufacturing does not excuse performance if such delays were not within the excepted reasons for delay.

49 Ct. Cl. 391, affirmed.

THE facts, which involve the construction of a contract for armor plate with the United States and the right of the contractor to recover sums withheld for delay in completion of the contract, are stated in the opinion.

Mr. James H. Hayden for appellant:

The company was not chargeable with the delay that occurred in the delivery of the armor or liable for the sum that the United States deducted as liquidated damages.

The first proviso in article 8 of the contract cannot be so interpreted as to allow the Department to refuse to pay the sum in dispute.

The contract was drawn by the Bureau of Ordnance, and any language of doubtful meaning contained in it should be given an interpretation favorable to the company, rather than one favorable to the Ordnance Department. *Noonan* v. *Bradley*, 9 Wall. 394, citing *Mayer* v. *Isaac*, 6 Mees. & W. 612; *Garrison* v. *United States*, 7 Wall. 668; *Orient Ins. Co.* v. *Wright*, 1 Wall. 456.

The proviso relates to the forfeiture by the company of part of the sum that the Department agreed to pay for the armor actually furnished. Clauses of contracts and of statutes relating to forfeiture invariably receive the one of two or more possible interpretations which is most favorable to the party against whom the forefeiture is asserted. *Phila., Wilm. & Balt. R. R.* v. *Howard*, 13 How. 307, 340; *N. Y. Indians* v. *United States*, 170 U. S. 1, 25.

Even in cases growing out of contracts of the United States, a penal clause, or one providing for the deduction of liquidated damages, is not to be given a liberal construction in favor of the Government.

Where the meaning of an instrument or statute is obscure and the language employed is a proper subject for interpretation, courts will give effect to every provision and word and will not treat any part of it as meaningless or nugatory, unless its provisions are in such hopeless conflict they cannot be reconciled. *Philadelphia* v. *River Front R. R.*, 133 Pa. St. 134.

The proviso does not purport to be complete in itself and on its face bears evidence of its incompleteness. The doctrine "expressio unius est exclusio alterius" is not to be followed in determining the true intent and meaning of a proviso of this nature. *United States* v. *Barnes*, 222 U. S. 513.

If the law required a strict and literal construction of the proviso in question, instead of the reverse, it would not justify the interpretation that the court placed upon it, for as we have seen, that is neither strict or literal, but really a distortion of the proviso.

The court's interpretation cannot be defended on the ground that it was reasonable, for it was not. *Minis* v. *United States*, 15 Pet. 423; *White* v. *United States*, 191 U. S. 545; *Weiss* v. *Swift*, 36 Pa. Sup. 376.

The Ordnance Department and the accounting officers, and the court also, proceeded with the idea that the proviso was a fit subject for the application of the maxim "expressio unius est exclusio alterius." But in the present instance the facts were not such as to warrant an attempt to apply it.

The delay in this case should be classed as an unavoidable cause, within the meaning of the provision in the contract. Broom's Leg. Max., 8th ed., 506; Id., 515; Id., 7th ed., 589.

This is not a case for the application of the doctrine of *ejusdem generis*. *United States* v. *Mescall*, 215 U. S. 26; *Chic., Mil. &c. Ry.* v. *Hoyt*, 149 U. S. 1, 14; Endlich, Inter. Stat., § 112; *McReynolds* v. *People*, 230 Illinois, 623;

26 Am. & Eng. Enc. Law, 2d ed., p. 610; *Brown* v. *Corbin*, 40 Minnesota, 508.

Delay in the performance of a contract may result from a cause, which, though unavoidable, and unavoidable in the sense in which that term is used in the contract, would not render performance impossible.

The credit allowed by the Chief of Ordnance for delay caused by act of the United States did not bar the company from asserting in court its right to further credit for the cause assigned or for any other cause of delay on account of which the Chief of Ordnance refused to allow any credit, supposing that he was not authorized to do so. *Milne* v. *United States*, 45 Ct. Cls. 314, 321, does not apply, and see *Gegiow* v. *Uhl*, 239 U. S. 3.

Mr. Assistant Attorney General Huston Thompson for the United States:

The causes of delay indicated in the contract did not include ignorance or lack of scientific knowledge on the part of appellant. The kind of delay excusable was one which must have arisen from some cause having no essential relation to the contract but as evidenced by the descriptive words therein.

An obstacle, merely because it was unforeseen, does not bring a delay resulting therefrom within the category of delays, such as are caused by the act of God, strikes, etc.

If unexpected impediments lie in the way, and a loss must ensue, the loss must fall where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated. *Hanthorn* v. *Quinn*, 69 Pac. Rep. 817; *The Harriman*, 9 Wall. 161; *Railroad* v. *Smith*, 21 Wall. 255; *Smoot* v. *United States*, 15 Wall. 36, 46; *Jacksonville &c. Ry.* v. *Hooper*, 160 U. S. 514, 527; *Simpson* v. *United*

States, 172 U. S. 372; *United States* v. *Gleason*, 175 U. S. 588, 602; *Satterlee* v. *United States*, 30 Ct. Cls. 31, 33, 50; *Rowe* v. *Peabody*, 93 N. E. Rep. 604; *Marsh* v. *Johnston*, 109 N. Y. Supp. 1104; *Lorillard* v. *Clyde*, 142 N. Y. 456; *Buffalo Co.* v. *Bellevue Co.*, 165 N. Y. 247; *Chicago R. R.* v. *Sawyer*, 69 Illinois, 285; Beach on Modern Law of Contracts, § 217; Chitty on Contracts, 272; *Day* v. *United States*, 48 Ct. Cls. 128.

Since the delay did not come within the descriptive terms of the contract relative to the causes for which delays would be excusable the lower court was right.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition in the Court of Claims for the recovery of $8,595.35, alleged to be due claimant as a balance of the price of armor plate furnished the Government under a contract between it and claimant.

The contract is an elaborate one and by it claimant engaged to manufacture for the Ordnance Department armor plates of a certain designated thickness in conformity with instructions, specifications and drawings attached to and made a part of the contract. And claimant agreed to provide certain of the 18-inch plates for the purpose of the ballistic test prescribed by the specifications, and that such plates when subjected to the ballistic test should fulfill certain requirements set forth in the specifications. The dates of delivery were to be on or before September 7, 1911, and November 7, 1911, and the place of delivery the Bethlehem Steel Company, South Bethlehem, Pennsylvania.

The Government engaged to receive the plates when manufactured, tested and approved as provided, and make payment for them in installments from time to time as the manufacture of the armor and material pro-

gressed and after delivery. In the event of the claimant failing to prosecute the manufacture of the armor and material properly or to complete delivery on or before the dates named in the contract, the Chief of Ordnance might complete such manufacture at the expense of claimant, charging it with the cost thereof in excess of the contract price; "or else (2) waive the time limit named in the contract and permit the claimant to complete the delivery of the armor and material within a reasonable time, and thereupon deduct from the sum stipulated to be paid the claimant for all of the armor and material, as liquidated damages, a sum equal to one-thirtieth of one per centum of the contract price of all armor and material remaining undelivered on November 7, 1911, for each day of delay in its delivery; Provided, however, that in computing the amount of any such deduction, the claimant should be given credit for delays occurring during the performance of the contract, which the Chief of Ordnance might determine to have been due 'to unavoidable causes, such as fires, storms, labor strikes, actions of the United States and so forth,' and that the date of completion of the delivery, for the purposes of the final settlement between the parties, should be a date to be ascertained by deducting, from the whole period between the signing of the contract and the date of the actual delivery, all delays which were found to have been due to unavoidable causes."

It is alleged that claimant encountered difficulties which were unforeseen by both parties when the contract was made, and were then unforeseeable, and in consequence thereof the delivery of the armor and pertaining material was delayed unavoidably.

That prior to the manufacture of the armor no face-hardened armor 18 inches in thickness had been manufactured in this or any foreign country and no information with respect to the process or processes to be employed in its manufacture was obtainable.

That for the purpose of learning what manner of treatment or face-hardening process should be applied to the 18-inch plates, and in order that they might attain the highest degree of efficiency possible and meet all the requirements of the specifications, claimant completed one of the plates, applying to it a treatment or face-hardening process deduced from the formula which claimant and every other manufacturer of armor plate in this and every foreign country had followed in the manufacture of armor plate and which was recognized by authorities on the subject as the one which would give the best results.

That upon its completion the plate was, on April 19, 1911, subjected to the ballistic test and it met the requirements of the specifications. Thereupon claimant proceeded to complete all of the plates, certain of which were selected for the purpose of the ballistic test and failed to fulfill the requirements of the specifications. Other plates were selected and failed. Thereupon claimant, with all due diligence and dispatch, made or caused to be made by metallurgical experts exhaustive tests and experiments, and it was ascertained that in order to pass the test required by the Ordnance Department the plates must possess certain metallurgical qualities or conditions which, up to that time, were unknown to any one and the necessity for which was not foreseeable when the contract was made. In conducting the test it was necessary to use plates of full size and the tests were conducted with all due diligence and dispatch. From the plates thus tested the Ordnance Department selected a third plate which was tested January 19 and 24, 1912, and was found to fulfill the requirements of the specifications. Claimant in due course finished all of the plates which the contract called for and they were approved and delivered as in the manner prescribed.

It is alleged that by reason of the circumstances de-

tailed there were delays in the delivery of the plates and that the delays were due to causes which were unavoidable within the meaning of the contract.

On account of the delays, however, the Ordnance Department proposed to deduct from the contract price of the armor and pertaining material the sum of $8,598.15 as liquidated damages on account of a portion of the delay. Claimant made protest, asserting that the delays were due to causes provided for in articles 4 and 8 of the contract.

By article 4 it was provided that in case of failure of claimant to deliver any or all of the armor contracted for there would be deducted from any payment to be made to claimant 1/30 of 1% of the contract price of all of the armor remaining undelivered for each and every day of delay in the completion of the contract, not, however, by way of penalty but as liquidated damages.

It was, however, provided in article 8 of the contract that the Chief of Ordnance in case of delay in the delivery of the armor as provided in article 1 of the contract, instead of completing the manufacture or delivery of the material at the expense of claimant, might waive the time limit and deduct from any payment due or to become due the liquidated damages, if any, provided for in article 4: "*Provided,* however, that in making final settlement based upon the date of completion of the delivery, the party of the first part [claimant] shall receive credit for such delays occurring during the performance of the contract as the Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery less the delays due to unavoidable causes; but none of the above causes shall constitute a basis for an action against the United States for damages."

The Government filed a demurrer to the petition. It was sustained as to $7,564.08 of the amount sued for and overruled as to $1,031.08. The damages on account of delay to the amount of the latter sum the court found was due to the Government's delay. The other sum, that is $7,564.08, the court attributed to the claimant, the court saying, through Chief Justice Campbell, that "the difficulties under which claimant labored were not due to 'unavoidable causes' within the meaning of those terms in the contract and, though unforeseen, did not render the performance impossible;" and added: "The court cannot make a different contract from that which the parties made for themselves. *The Harriman*, 9 Wall. 161, 172; *Sun Printing & Publishing Ass'n* v. *Moore*, 183 U. S. 642; *Satterlee's Case*, 30 Ct. Cls. 31; *Pacific Hardware Co.* v. *United States*, 48 Ct. Cls. 399."

It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable or were of the character described in the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

But even if this cannot be asserted, the case falls within *The Harriman*, *supra*, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse performance."

And it was held in *Sun Printing Ass'n* v. *Moore*, *supra*, that "it was a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law or the other party. Unforeseen difficulties, however great, will not excuse him." Cases were cited, and it was said the principle was sustained by many adjudications.

It was said, however, in *The Harriman*, 9 Wall. 161, 172, that "the answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation," and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract, that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention is that it is the same "genus or kind," because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfillment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract—is not a cause extraneous to it and

independent of the engagements and exertions of the parties.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* GUARDIAN TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 85. Argued December 13, 14, 15, 1915.—Decided February 21, 1916.

A reorganization scheme adopted upon the foreclosure of a mortgage of a railroad company and a purchase thereunder which provides substantially for the stockholders of the company, but which makes inadequate provision for its unsecured creditors, cannot be sustained; and in this case, *held*, that the purchaser was chargeable with such unsecured debts. *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482.

One owning both stock and floating debt of a company whose property is under foreclosure and who assents to a scheme of reorganization which does not on its face show that it unduly provides for the stockholders and does not adequately provide for the unsecured creditors is not precluded from subsequently claiming that for such reason the property is still chargeable after the sale with his unsecured debt.

On the facts of this case, *held*, that the party attacking a reorganization scheme as not adequately protecting unsecured creditors while providing for stockholders was not barred by laches.

Even though reorganization schemes must be framed so as to induce parties interested to come in and furnish fresh money, and courts should avoid artificial scruples in considering such arrangements, substantial justice must be done and well settled rules of equity must not be transgressed.

210 Fed. Rep. 696, affirmed.

THE facts, which involve the validity of a scheme of reorganization adopted upon the foreclosure of a railroad company and a purchase of the same which provided for the stockholders but left its unsecured creditors inadequately provided for, are stated in the opinion.

Mr. S. W. Moore and *Mr. Samuel Untermyer* for appellants:

The plan of reorganization is binding upon the Trust Company because it actively participated in the plan and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

The application of the doctrine of "quasi-estoppel" or of estoppel by the acceptance of benefits is fatal to any right of recovery on the part of the Trust Company. *Compton* v. *Jessup*, 167 U. S. 1; *Daniels* v. *Tearney*, 12 Otto, 415; *Farmers' Bank* v. *Groves*, 12 Howard, 51; *Gaddes* v. *Pawtucket Institution*, 80 Atl. Rep. 415; *Inter. Contracting Co.* v. *Lamont*, 155 U. S. 303; *Loy* v. *Alston*, 172 Fed. Rep. 90; *North Chicago R. R.* v. *Chicago Traction Co.*, 150 Fed. Rep. 612, 626; *Post* v. *Beacon Co.*, 84 Fed. Rep. 371; *Sage* v. *Finney*, 135 S. W. Rep. 996; *Seminole Securities Co.* v. *Southern Ins. Co.*, 182 Fed. Rep. 85; *State* v. *Bank*, 95 N. W. Rep. 1116; *Shackleton* v. *Baggaley*, 170 Fed. Rep. 57, 59; *Towers* v. *African Tug Co.*, L. R. 1 Ch. 1904, 558; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Morse*, 218 U. S. 493; *Winslow* v. *Railroad*, 208 U. S. 59; *Wormser* v. *Metropolitan St. Ry.*, 76 N. E. Rep. 1036.

The doctrine of equitable election is a complete bar to a recovery by the Trust Company. *Codrington* v. *Lindsay*, 8 I. R. Ch. App. 578, 587; *Merchants' Bank* v. *Sexton*, 228 U. S. 634.

The doctrine of equitable estoppel is also a complete bar to a recovery by the Trust Company. *Bank* v. *Heckman*, 148 Indiana, 490; *Canton Co.* v. *Rolling Mill*, 155 Fed. Rep. 321; *Farmers' Trust Co.* v. *Railway Co.*, 120 Fed. Rep. 1006; *Fiske* v. *Carr*, 20 Maine, 301; *Gutzweiler* v. *Lackman*, 23 Missouri, 168; *Jacobs* v. *Lumber Co.*, 15 S. W. Rep. 236; *Jessup* v. *Hulse*, 21 N. Y. 168; *Kahn* v. *Peter*, 16 So. Rep. 524; *Matthews* v. *Murchison*, 15 Fed. Rep. 691; *Mitchell* v. *Mitchell*, 61 Atl. Rep. 570; *Olliver* v. *King*, 8 De G., M. & G. 110; *Perisho* v. *Perisho*, 71 Ill. App. 222; *Rapalee* v. *Stewart*, 27 N. Y. 310; *Reagan* v. *First National Bank*, 61 N. E. Rep. 575; *Richards* v. *White*, 7 Minnesota, 345; *Smith* v. *Espy*, 9 N. J. Eq. 160; *Symmes* v. *Union Trust Co.*, 60 Fed. Rep. 830; *Thompson* v. *Cohen*, 127 Missouri, 215; *Vose* v. *Cowdrey*, 49 N. Y. 336.

Under the rule of the *Boyd Case*, 228 U. S. 482, the Trust Company is not entitled to recover.

The Trust Company is barred from a recovery in this action by its covenant that it would not hold the new company for the debts of any of the old ones. *C., R. I. & P. Ry.* v. *Howard*, 7 Wall. 392; *L. N. A. & C. Ry.* v. *Louisville Trust Co.*, 174 U. S. 674; *Medill* v. *Snyder*, 58 Pac. Rep. 962; *Nor. Pac. Ry.* v. *Boyd*, 228 U. S. 482; *Stone* v. *Cook*, 179 Missouri, 534; *Young* v. *Young*, 27 Atl. Rep. 627.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

A resulting trust was created in favor of the Railway Companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The

Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company. *Albright* v. *Oyster*, 140 U. S. 493; *Augusta Rd. Co.* v. *Kittel*, 52 Fed. Rep. 63; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 15; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414; *Condit* v. *Maxwell*, 142 Missouri, 266; *Ducie* v. *Ford*, 138 U. S. 587; *Farmers' Trust Co.* v. *Denver R. R.*, 126 Fed. Rep. 46; *Guaranty Trust Co.* v. *Atlantic &c. R. R.*, 138 Fed. Rep. 517; *Lauter* v. *Trust Co.*, 85 Fed. Rep. 894–903; *McGourkey* v. *Toledo R. Co.*, 146 U. S. 536; *New England Water Works* v. *Farmers' Loan & Trust Co.*, 136 Fed. Rep. 521; *Osborn* v. *Perkins*, 122 Fed. Rep. 127, 131; *Sanford* v. *Loan Society*, 80 Fed. Rep. 54; *Toledo, Delphos &c. R. R.* v. *Hamilton*, 134 U. S. 296; *Wade* v. *Chicago R. R.*, 149 U. S. 327; *Wade* v. *Sewell*, 56 Fed. Rep. 129; *Watson* v. *Bonfils*, 116 Fed. Rep. 157.

Even if it should be held that the Trust Company has a right of recovery, it should be limited to such equitable terms as in the opinion of the court should have been offered at the time of the reorganization.

There was no exception to the Master's report in the court below challenging the correctness of his finding that the Southern Company was not liable for the floating indebtedness of the Belt Company. The decision of the Court of Appeals that such finding can be reviewed in an appellate court in the absence of exceptions is in conflict with the decisions of the courts of appeal of other circuits and with the rulings of this court. *Brockett* v. *Brockett*, 3 How. 692; *Burns* v. *Rosenstein*, 135 U. S. 449; *New Orleans* v. *Fisher*, 91 Fed. Rep. 574; *Columbus R. R. Appeals*, 109 Fed. Rep. 117, 219; *Coghlan* v. *South Car. R. Co.*, 142 U. S. 101, 115; *McMicken* v. *Perrin*, 18 How.

504, 587; *Medsker* v. *Bonebrake*, 108 U. S. 66, 72; *Provident Trust Co.* v. *Camden Ry.*, 177 Fed. Rep. 854, 859; *Sanford* v. *Embry*, 151 Fed. Rep. 977, 982; *Sheffield Ry.* v. *Gordon*, 151 U. S. 285, 290; *Story* v. *Livingston*, 13 Pet. 359, 366; 17 Enc. Pl. & Prac. 1047; 2 Foster's Federal Practice, § 315; *Topliff* v. *Topliff*, 145 U. S. 156; 2 Street on Fed. Eq. Prac., §§ 1476, 1486.

The action of the Court of Appeals is final so that an application for certiorari at this time is not premature. *Beasley* v. *Tex. & Pac. Ry. Co.*, 191 U. S. 492; *Denver* v. *N. Y. Trust Co.*, 229 U. S. 132; *Harriman* v. *Nor. Securities Co.*, 197 U. S. 244; *Merrill* v. *National Bank*, 172 U. S. 131.

Mr. Frederick W. Lehmann and *Mr. George H. English, Jr*, with whom *Mr. Edward P. Gates* and *Mr. Walter C. Clephane* were on the brief, for appellee:

The property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders. *Central Imp. Co.* v. *Cambria Co.*, 201 Fed. Rep. 811; *Same* v. *Same*, 210 Fed. Rep. 696; *North. Pac. Ry.* v. *Boyd*, 228 U. S. 482.

The amount bid at the foreclosure sale of the Belt property was no evidence of its value. *Investment Registry* v. *C. & M. E. R. Co.*, 212 Fed. Rep. 504; *North Pac. Ry.* v. *Boyd*, 228 U. S. 482; § 8, Art. 12, Const. Missouri; § 962, Rev. Stat. Missouri, 1899; *Shickle* v. *Watts*, 94 Missouri, 410; *Moffit* v. *Hereford*, 132 Missouri, 513; *Louisville Trust Co.* v. *Louisville Ry.*, 174 U. S. 674.

The plan of reorganization provided for the payment of the debts of the old companies.

The estimate as to the floating debt was not intended as a limitation upon the amount to be paid under the plan.

The provision for the payment of debts made by the plan was not limited by the interests of the bondholders.

There was no exclusion of creditors who were also bondholders and stockholders.

All the creditors save the Trust Company were paid and the Trust Company was paid in part.

The Trust Company was entitled to enforce the provisions of the plan as a contract made for its benefit. *Second National Bank* v. *Grand Lodge*, 98 U. S. 123; *Johns* v. *Wilson*, 180 U. S. 440; § 1729, Rev. Stat. Missouri, 1909; *Meyer* v. *Lowell*, 44 Missouri, 328; *Beattie Mfg. Co.* v. *Clark*, 208 Ibid. 89.

There was no covenant by the Trust Company that it would not hold the new company for any of the debts of the old. *Webster* v. *Ins. Co.*, 53 Oh. St. 558; *Hobbs* v. *McLean*, 117 U. S. 567; *United States* v. *Cent. Pac. Ry.*, 118 U. S. 235; *Noonan* v. *Bradley*, 9 Wall. 394.

The Trust Company was not barred as a creditor by participating in the plan as bondholder and stockholder.

The Southern Company was liable as being a consolidation of the old companies. See § 1059, Rev. Stat. of Missouri, 1899; *Leavenworth County* v. *Railroad*, 134 U. S. 688; *State ex rel.* v. *Lesueur*, 145 Missouri, 594; *Wells* v. *Electric Co.*, 108 Mo. App. 607; *Barrie* v. *United Railways*, 138 Mo. App. 557; *Johnson* v. *United Railways*, 247 Missouri, 326; *C. S. F. & C. Ry.* v. *Ashling*, 160 Illinois, 373; *Shadford* v. *Detroit Ry.*, 130 Michigan, 300.

The "Equitable Terms of Recovery" now suggested by the Southern Company are very inequitable.

The lands of the Central Improvement Company did not pass under the after acquired property clause of the Belt mortgage. *Humphreys* v. *McKissock*, 140 U. S. 304; *Pardee* v. *Aldridge*, 189 U. S. 429; *Smith* v. *McCullough*, 104 U. S. 25; *Railroad* v. *Coffin*, 50 Connecticut, 150; *Densmore* v. *Railroad*, 12 Wisconsin, 649.

Even though the exception to the Master's report did not formally and directly challenge the correctness of his finding, which was one of law, that the Southern Company

was not liable for indebtedness of the Belt Company, none the less in the circumstances of the case it was competent and proper for the court to consider and determine the question upon its merits. *Guardian Trust Co.* v. *Kansas City Southern Ry.*, 201 Fed. Rep. 811; *Central Imp. Co.* v. *Cambria Co.*, 210 Fed. Rep. 696; *Sheffield Ry.* v. *Gordon*, 151 U. S. 285; 17 Enc. Pl. and Prac. 1048; 2 Daniel Chanc. Pl. and Prac. 1314; *Himley* v. *Rose*, 5 Cranch, 313; *Burke* v. *Davis*, 81 Fed. Rep. 907; *Celluloid Mfg. Co.* v. *Cellulite Mfg. Co.*, 40 Fed. Rep. 476; *Gordon* v. *Lewis*, 2 Sumner, 143; *Brooks* v. *Robinson*, 54 Mississippi, 272; *Haymond* v. *Murphy*, 65 W. Va. 616; *Webster* v. *Cadwallader*, 133 Kentucky, 500; *Lehman* v. *Powe*, 95 Mississippi, 446; *Von Phalen* v. *Winterbotham*, 203 Illinois, 202.

There is no reason of law, policy or morals for preferring stockholders to general creditors in the reorganization of railroad properties.

Mr. Harry S. Mecartney, with whom *Mr. Newell H. Clapp* was on the brief for intervening stockholders.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree in which the Circuit Court of Appeals decided that the Guardian Trust Company as an unsecured creditor of the Kansas City Suburban Belt Railroad Company was entitled to charge the appellant for the Belt Company's debt, because the reorganization scheme, adopted upon a foreclosure of a mortgage of the Belt Company's property and a purchase by the appellant, left the unsecured creditors inadequately provided for while it made a considerable provision for the stockholders in the Belt Road. *Guardian Trust* v. *Cambria Steel*, 201 Fed. Rep. 811; 120 C. C. A. 121. 210 Fed. Rep. 696; 127 C. C. A. 184. See *Nor. Pac. Ry.* v. *Boyd*, 228 U. S. 482.

The facts are less complicated than the proceedings that

have grown out of them. The Kansas City, Pittsburg and Gulf Railroad extended from Kansas City to Port Arthur on the Gulf of Mexico. It used terminals at Kansas City belonging to the Belt Company above mentioned, and companies in its control, and at Port Arthur belonging to a Dock Company. All three were mortgaged and after a default on the bonds of the Gulf Company in 1899 a plan was made to bring the road and terminals into one hand. The Gulf Company's mortgage was to be foreclosed and a new company formed which was to exchange its own securities for the stock and bonds of the Gulf, Dock and Belt Companies, making a new mortgage to raise the necessary funds. The Gulf Company's mortgage was foreclosed, the appellant Company was formed, issued its new securities, and in March and April, 1900, became the owner of the Gulf road and of most of the stocks and bonds of the old companies including the Belt Company. In September, 1900, a suit was begun to foreclose the Belt mortgage, and on December 31, 1901, it was sold for the amount of its mortgage to the appellant. The Court of Appeals thought it plain that the foreclosure was part of the original plan; and as it also thought that the mortgaged property was worth enough above the mortgage to pay the unsecured creditors, it held that the stockholders when receiving pay for their stock were receiving it in substance as the proceeds of a transaction that removed all property of the Belt Company from its unsecured creditors' reach. The appellant was the principal holder of the Belt Company stock, as well as the purchaser of its property with notice of the outstanding debts, and therefore was decreed to pay the Trust Company's claim.

The proceedings began with a creditors' bill by the Cambria Steel Company against the Belt Company and the Guardian Trust Company to prevent the latter from selling securities held by it for an alleged debt of the Belt Company, the bill denying the debt. The Court of

Appeals thought that this suit was really a suit of the appellant. The Cambria Steel Company has disappeared and the proceedings have been carried on by the Belt Company, the instrument of the appellant, and later by the appellant, intervening in the suit, and all charging that the Trust Company was indebted to the Belt. The Trust Company, on the other hand, asserted its rights and prayed judgment for its debt in its answer to the Belt, although it failed to insert a similar prayer in its answer to appellant. The ground of the appellant's intervention was that the Belt mortgage covered after-acquired property, so that it was entitled to the securities in the Trust Company's hands unless the Trust Company could make good its claim. On the other hand the decree foreclosing the Belt mortgage expressly left open the right of the Trust Company to contend that the appellant was bound to pay the Belt Company's unsecured debts.

The appellant attacks the conclusion of the Circuit Court of Appeals upon several grounds. In the first place it contends that the Trust Company is bound by the plan because it was a party to it, exchanged its own Belt Company stock in pursuance of it, was a depositary under it and used all its influence to induce other stockholders and bondholders to come in. It asserts that the plans contained an express covenant not to hold the new company liable for the debts of the old one. It also asserts that the property was not worth more than the mortgage. We will consider these and some subordinate matters in turn.

The plan presented elaborate estimates of the funds required. One item was "For present stock [of the Kansas City Suburban Belt Railroad Company] one-quarter of a share of new preferred stock and three-quarters of a share of new common stock of the company as reorganized for each share of the present stock of those who may deposit thereunder." The Trust Company exchanged its stock and it is said that by its retention of this benefit

it has precluded itself from claiming its debt. But the plan also stated at the outset as one of the results to be attained, "The payment of the floating debt and the existing Car Trust obligations," and at a later point it allowed for payment of floating debts, $475,000, to come from proceeds of the sale of first mortgage bonds and preferred stock and payment of $10 per share by participating stockholders. It is true that the estimate turned out to be much too small, but the plan did not on its face give notice of an intent to prefer the Belt stockholders to its creditors, and therefore the Trust Company by assenting to it and exchanging stock under it lost no rights. What has happened is that, owing perhaps to unexpected difficulties, the plan has not been carried out. The appellant has no ground for complaining that the Trust Company has not tendered back its stock, which it took before the foreclosure of the Belt Road was begun.

But it is said that the Trust Company covenanted not to assert its claim because the agreement provided that 'no right is conferred, nor any trust, liability or obligation (except . . .) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, . . . with respect to any property acquired by purchase at any foreclosure sale.' It appears to us that argument cannot make plainer the meaning of these words. They exclude an obligation arising from the instrument but neither purport to nor could exclude rights of creditors founded on the facts to which we have referred. Those rights were untouched and none the less that this particular creditor became a party to the agreement because of its other interests that were concerned. We may remark in this connection that we are equally unable to find in the plan a contract in favor of the Trust Company as an unsecured creditor. The plan sets out a

general scheme that it was hoped would be worked out, but its nature, the words quoted, and the authority given to the committee for carrying out the plan to modify it and to use their discretion all are inconsistent with the notion of a promise that all unsecured debts should be paid.

As the claim of the Trust Company was put by the Court of Appeals upon the equitable right of creditors to be preferred to stockholders against the property of a debtor corporation, it is essential to inquire whether the appellant received any such property, that is whether it got by the foreclosure more than enough to satisfy the mortgage, which was a paramount lien. The Master found, as he expressed it, in the absence of proof to the contrary, that the amount for which the property was sold, $1,000,000, the amount of the mortgage, was its fair market value. Although the evidence was not reported the Circuit Court of Appeals was of opinion that it sufficiently appeared that there was a valuable equity. The argument for the appellant assumes that the different conclusion was reached while leaving the Master's finding to stand. But the decision rather lays that finding on one side upon considerations that may be summed up in a few words. The allowance made for the Belt Company's bonds shows that they were regarded as well secured. The stockholders of the Gulf Company in their exchange paid ten dollars a share for stock of the appellant received by them. Therefore it must be assumed that the stock of the appellant was worth at least that amount. Therefore the $4,750,000 of that stock given for the Belt Company's stock was worth at least $475,000, and probably more. But the value of this stock depended on the value of the Belt Company's property above the mortgage. It appears to us that while perhaps not justifying definite figures, the reasoning warrants the belief that there was an equity for which the appellant must account.

The appellant urges that the foreclosure sale is to be

treated as a distinct transaction—that after it had become the owner of the greater part of the bonds and stock of the Belt Company it was free to do as it pleased. If it had simply kept the stock it would have incurred no liability to creditors of the Belt Company and an independent foreclosure would put it in no worse place. But the ownership of the Belt Road by the new company was contemplated from the first and although no fraud on creditors was suggested or intended in the plan, still the Court of Appeals was justified in regarding the whole proceeding as one from the start to the close and in throwing on the appellant the responsibility of so carrying it out as to avoid inequitable results.

It is said that the Trust Company is barred by laches: that the appellant took possession on January 1, 1902, and that the Trust Company did not assert its claim until 1905 in this cause; that it knew and was intimately connected with every step of the reorganization and was silent at a time when its conduct would influence others, as the successful assertion of its claim would have depressed the market value of the appellant's stock and bonds. But the Trust Company set up its claim in this suit in answer to the Cambria bill on November 5, 1900. The very ground of the bill was to prevent the Trust Company from selling securities to satisfy the claim as it had given notice that it intended to. The company tried to become a party to the Belt foreclosure and did succeed in saving its rights from prejudice. When later the Belt Company and the appellants came into this suit it set up its claim again. Without going into further detail we are of opinion that the Trust Company is not barred.

Some technical objections may be left pretty much upon the decision below. 210 Fed. Rep. 699. It is objected that the liability of the appellant is not open because the exception to the Master's conclusion against it was put upon other grounds than the merits, but we

see no reason to doubt that the Court of Appeals was right in thinking that justice would be done by adopting the course that it did. So it is said that the appellant was induced by the form of the exceptions to forego reopening the Master's finding that the Belt Company was indebted to the Trust Company. But it is not to be believed that the appellant has given up anything that it thought worth insisting upon. 210 Fed. Rep. 700. So as to the absence of a specific prayer for relief in the Trust Company's answer to the appellant's intervention in its own name. In short while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements should lead Courts to avoid artificial scruples, still we are not prepared to say that the Court of Appeals was wrong in finding that there had been a transgression of the well settled rule of equity in this case, or that it went further than to see that substantial justice should be done.

There is a motion to dismiss upon which in view of our decision the defendant in error would not desire to insist, and on the other side a petition for certiorari in case its appeal should be dismissed. In the circumstances the distinctions become of little importance. But the Cambria bill asserted a lien under the judgment of a Federal court and the petition of the appellant asserted title under a decree of a Federal court, so that the decree may be affirmed upon the appeal. *Cooke* v. *Avery*, 147 U. S. 375. *Commercial Publishing Co.* v. *Beckwith*, 188 U. S. 567, 569. The case has been so fully discussed below that we think it unnecessary to go into further detail.

Decree affirmed.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER are of opinion that upon the findings of the Master the decree should be reversed, and therefore dissent.

ISADOR STRAUS ET AL., TRADING AS R. H. MACY & CO., *v.* NOTASEME HOSIERY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 184. Argued January 17, 18, 1916.—Decided February 21, 1916.

While one using an unregistered design similar to that adopted earlier by another may be enjoined from further use thereof, he may not be charged with profits if it appear that the original imitation was unintentional, that no deceit or substitution of goods was accomplished in fact, and that no considerable part of the business was due to his goods being supposed to be those of the earlier user of the design.

One innocently adopting an unregistered design and continuing to use the same after notice, not for the purpose of stealing the good will of the earlier user but of preserving his own business, *held*, in this case, not to be charged with profits not shown to have been obtained by sales of articles supposed to be those of the earlier user.

Relief for unfair competition not given, as the supposed unfairness consisted mainly in the use of a device that the earlier user sought to have registered but was refused.

215 Fed. Rep. 361, reversed in part.

THE facts, which involve questions of unfair competition by using an unregistered trade-mark adopted as a business design for hosiery, are stated in the opinion.

Mr. Edmond E. Wise for petitioner.

Mr. E. Haywood Fairbanks, with whom *Mr. James H. Griffin* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the Notaseme Hosiery Company to restrain infringement of a registered trade-mark and unfair competition alleged to have been practiced by the petitioners, and to recover damages and

profits. The plaintiff's trade-mark, as registered, was a rectangle with a black band running from the left hand upper to the right hand lower corner, the upper and lower panels on the two sides of the band being printed in red. As used, it contained the word Notaseme in white script upon the black band, with the words Trade Mark in small letters upon the white, and beneath the label was printed "Reg. U. S. Pat. Office." In fact registration had been refused to the label with the word Notaseme upon it, that word being merely a corrupted description of the seamless hosiery sold. The defendants, among other items of a large retail business in New York, sold hose with seams, which they advertised under the name Irontex. After this name had been adopted, in pursuance of their request designs were submitted to them and one was chosen. It turned out that this was made by the printer who had made the Notaseme label. It also was a rectangle with a diagonal black band and red panels, the band in this case running from the right hand upper corner to the left hand lower, and having the word Irontex in white script upon the band and 'The hose that—wears like iron' printed in black upon the two triangles of red. The defendants never had seen or heard of the plaintiff, its label or its goods until November, 1909, when they were notified by the plaintiff that they were infringing its registered trade-mark. They ultimately stood upon their rights.

At the original hearing in the Circuit Court it was held that the plaintiff had embodied such a misrepresentation in the trade-mark as used that it would not be protected, and that unfair dealing was not made out. This decision was reversed by the Circuit Court of Appeals on the ground that although the evidence did not show actual deception, the label used by the defendants so far resembled the plaintiff's that it would have deception as its natural result and that the plaintiff was entitled to

relief whether the trade-mark on its label was good or bad as such. 201 Fed. Rep. 99. The plaintiff was allowed to recover profits from a reasonable time after the defendants had notice of the similarity of the two designs, which was put at January 1, 1910. 209 Fed. Rep. 495. 215 Fed. Rep. 361. 131 C. C. A. 503.

We agree with the Circuit Court that the plaintiff is not in a position to recover for an infringement of a registered trade-mark. The mark that it used held out to the public as registered in the Patent Office precisely the element that had been rejected there. It affirmed that the authority of the United States had sanctioned that for which that authority had been refused, and by grasping at too much lost all so far as this case is concerned. *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.*, 183 U. S. 1, 8. The liability of the defendant must be derived from unfair competition if it exists.

That it was unfair to continue the use of a label so similar in general character to the plaintiff's we are not disposed to deny. But it does not follow that the defendants are chargeable with profits as a matter of course. Very possibly the statutory rule for wrongful use of a trade-mark may be extended by analogy to unfair competition in a proper case. But as the ground of recovery in the latter instance is that the defendant has taken some undue advantage of the plaintiff's reputation, or that of his goods, and as the nature and extent of the wrong may vary indefinitely, it cannot be assumed in all cases that the defendant's sales were due to that alone.

Ordinarily imitation is enough to imply that the matter imitated is important at least to the sale of the goods. But when the similarity arises as the one before us did, it indicates nothing, except perhaps the poverty of the designer's invention. Furthermore the defendants' persistence in their use of the design after notice proves little or nothing against them. They had been advertising

their goods by name and using the design in connection with the name. The natural interpretation is not that they wanted to steal the plaintiff's goodwill of which they then learned for the first time, but that they wished to preserve their own. When they stood upon their rights of course they made themselves responsible for the continued use of a label that might be held likely to deceive, and if it should be held manifestly to have that tendency, they would be chargeable for what in contemplation of law was an intentional wrong, or a fraud, although the case is wholly devoid of any indication of an actual intent to deceive, or to steal the reputation of the plaintiff's goods. If the defendants' conduct was a wrong, as we have assumed, it was a wrong knowingly committed, but no further inference against the defendants can be drawn from the fact.

It seems a strong thing to give relief on the ground of unfair competition when the supposed unfairness consists mainly in the imitation of a device that sought, obtained and lost protection as a trade-mark. If a would-be trade-mark loses its protection as such, that means that the public has a right to use it, and it would be strange to bring the protection back simply by giving it another name. If the red square with the diagonal black band is not a trade-mark it would seem to be free to the world. See *Flagg Manufacturing Co.* v. *Holway*, 178 Massachusetts, 83, 91. *Saxlehner* v. *Wagner*, 216 U. S. 375, 380, 381. We assume that coupled with the script upon the band there is sufficient pictorial similarity to deceive some persons, but, unless we go considerably farther, to charge the defendants with all the profits would be unjust.

The question remains whether the petitioners' sales probably were induced to any large extent by confusion in the mind of the public between the petitioners' goods and the plaintiff's. The goods were different in character, were called by a different name, were sold mainly in dif-

ferent places and by parties not likely to be mistaken for each other. The petitioners had advertised them as Irontex since April, 1908. Their business was that of retailers in the City of New York where they were widely known. The Notaseme Company's business was wholesale, from Philadelphia, starting with New England and the South. So far as purchasers bought because the petitioners recommended the goods, or on the strength of the name, by whatever recommended, as distinguished from the colors and figures of the label, or from knowledge of the specific article, or from preference for full fashioned over seamless hose, or for any reason but the inducement of the red square, bar and script supposed to indicate the plaintiff's hose, the plaintiff has no claim on the petitioners' profits.

There is some indication that the plaintiff's business was mainly in hosiery for men, while Macy & Co.'s was more than three-quarters for women and children. That the name, which the defendants do not imitate, but on the contrary exclude by using another wholly unlike it, was thought more important by the plaintiff than it now is willing to admit, is shown not only by the use of it upon the trade-mark proper, but by the adoption of a new name for the plaintiff company to conform to it. Taking all these considerations into account, coupled with the absence of evidence that any deceit or substitution was accomplished in fact, we find it impossible to believe that any considerable part of the petitioner's business was due to their goods being supposed to be the plaintiff's hose. The petitioners properly were enjoined from further use of the mark in controversy, but so far as the decree charged them with profits it is reversed.

Decree reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

ROGERS *v.* HENNEPIN COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 104. Argued December 6, 1915.—Decided February 21, 1916.

Where the state court does not decide against plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely, this court has jurisdiction to review the final judgment under § 237, Jud. Code.

The state court having stated in a *per curiam* opinion that this case was controlled by the judgment in another similar case in which it entertained and decided the same Federal questions as to constitutionality of the tax sought to be enjoined, *held* that although there may have been other questions involved in this case, the judgment did not rest upon an independent state ground.

Memberships in exchanges, such as those involved in this action, are property notwithstanding restrictions upon their use, and nothing in the Federal Constitution prevents their being taxed.

Whether memberships in exchanges are in fact taxable under the state statutes is a matter of local law.

Memberships in an incorporated exchange, as property of the respective members, are distinct from the assets of the corporation, and taxing the members on their memberships and the corporation on its assets does not amount to double taxation.

The correct valuation of property is a matter for the taxing officials; and, where there is no charge of denial of opportunity to be heard, this court does not sit to review their judgment.

Memberships in an Exchange represent rights and privileges to be exercised at the exchange where located, and it is competent for a State to fix the *situs* of memberships of both residents and non-residents for the purpose of taxation at the place where the exchange is located, and in so doing it does not deprive non-resident members of their property without due process of law.

The State has a broad discretion as to tax exemptions, and the taxation of memberships in association conducting exchanges in which business transactions are conducted for profit does not deny equal protection of the laws because memberships in other associations not conducting business exchanges and where there are manifest

distinctions are not also taxed; the classification has a reasonable basis.

124 Minnesota, 539, affirmed.

THE facts, which involve the constitutionality, under the Fourteenth Amendment, and the construction, of statutes of Minnesota and proceedings thereunder levying taxes upon memberships in trade exchanges in that State, are stated in the opinion.

Mr. H. V. Mercer for plaintiff in error.

Mr. Lyndon A. Smith, Attorney General of the State of Minnesota, and *Mr. William J. Stevenson*, with whom *Mr. John A. Rees* was on the brief, for defendants in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a suit in equity to cancel certain assessments for the year 1912, and to restrain the collection of taxes imposed accordingly upon the plaintiffs and others in like case with respect to their memberships in the Chamber of Commerce of the City of Minneapolis. There were three groups alleged to be represented by the respective plaintiffs: One, of members residing in Minneapolis; another, of those residing within the State, but outside that City; and a third, of citizens and residents of other States. The complaint, among other things, averred in substance that the Chamber of Commerce was incorporated under the laws of Minnesota; that it had no capital stock and transacted no business for profit; that it furnished buildings and equipment for its members who, under its rules, transacted business with each other (for themselves and their customers) upon the trading floor which was in fact a grain exchange; that the property of the corporation had been fully taxed; that the memberships, in case of winding up, would have actually no value

above the assets so taxed; that it had been the practical construction of the tax laws of the State that such memberships were not taxable; that the assessments in question had been laid under the head of "Moneys and Credits," and that they were excessive; that memberships in other associations were not taxed 'although standing in a similar position'; that the members of the Chamber of Commerce were 'unlawfully and prejudicially' discriminated against 'by unequally assessing them' and that their property was taken 'without due process of law, contrary to the state and federal constitutions'; that, unless restrained, the attempt to enforce the tax would result in a multiplicity of suits; that in the case of members residing outside of the City of Minneapolis, the certificates of membership were 'kept at their respective residences' and such members did not 'operate' upon the exchange personally except 'at rare intervals,' and that their use of such memberships was practically limited to benefits obtained 'from having other members buy or sell grain for them as commission merchants' at one-half the 'regular commission' by reason of 'a privilege extended to the members under the rules.'

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court denied a motion for temporary injunction and sustained the demurrer, and thereupon judgment was entered in favor of the defendants. The plaintiffs appealed to the Supreme Court of the State, assigning as error the holding of the trial court that the assessments 'did not deny to the several members in the respective classes the equal protection of the laws' and did not constitute a taking of property 'without due process of law and without compensation' contrary to the Federal Constitution. The latter objection was stated in various forms, specific complaint being made of the assessment of those members who were said to be outside the

jurisdiction of the taxing officers. Another appeal was then pending in the same court in the case of *State* v. *McPhail*, relating to the taxation of memberships in the Board of Trade of Duluth and, by stipulation, the appeals were heard together. In the Duluth case, the Supreme Court held that the membership was taxable under the statutes of the State and, further, sustained the tax there laid as against contentions under the due process and equal protection clauses of the Fourteenth Amendment. The court said: "We do not sustain the claims that the taxation of memberships in a Board of Trade or Stock Exchange, would violate provisions of the Federal or State constitution. . . . We see no improper classification here, nor any lack of equality or uniformity. Nor would it be double taxation. The members of the Board are not required to pay taxes on the physical and tangible property of the Board, nor does the Board pay taxes upon the intangible rights which constitute the value of a membership. And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal Constitution and amendments." *State* v. *McPhail*, 124 Minnesota, 398.

At the same time, the decision in the instant case was rendered with an opinion *per curiam* in which, after a summary statement of the nature of the case, the court ruled as follows: "The case was submitted on briefs in this court with *State* v. *McPhail*. The decision in that case, filed herewith, controls this. Judgment affirmed." *Rogers* v. *Hennepin County*, 124 Minnesota, 539. And this writ of error has been sued out.

The defendants in error insist that the decision of the state court involved no Federal question; that the suit was for injunction and that the plaintiffs had an adequate

remedy at law. They invoke the familiar rule that when the decision of the state court rests upon an independent or non-Federal ground, adequate to support it, this court has no jurisdiction. *Hammond* v. *Johnston*, 142 U. S. 73, 78; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470. But the state court, which alone determines local questions of procedure, did not deny relief because an injunction was sought or because it was considered that under the state law another remedy was appropriate. It said nothing whatever as to the form of remedy, or as to the right to proceed in equity, but considered and decided the case on the merits, including the Federal questions. No other conclusion can be drawn from the fact that the sole reason for the decision is found in the reference to *State* v. *McPhail* as authority,—a case in which no procedural question was involved. There, the action was brought by the State itself to recover the tax, and the decision was directly and exclusively upon the validity of the tax, it being sustained first, as one authorized by the state law, and, then, as not repugnant to the Federal Constitution. The fact that there were some objections to the constitutional validity of the tax in the present case that were not urged in the *McPhail Case*, does not affect the matter. They were all grounds for the contention that the tax denied the equal protection of the laws and took property without due process of law. That was the ultimate contention which was overruled with respect to the tax in the *McPhail Case*, and the allusion to that decision as 'controlling' plainly meant that the court thought that all the reasons urged for a different view were without merit and that the present tax did not violate the Fourteenth Amendment. It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has

jurisdiction to review the judgment, assuming it to be a final judgment as it is here. *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 642; *San Jose Land Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 179, 180; *Am. Exp. Co.* v. *Mullins*, 212 U. S. 311, 313; *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55, 63; *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 257; *Carlson* v. *Curtiss*, 234 U. S. 103, 106; *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, 49.

It is not to be doubted—giving full effect to all the allegations of the complaint—that the memberships despite the restrictions of the rules were property. See *Hyde* v. *Woods*, 94 U. S. 523, 525; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 12; *Page* v. *Edmunds*, 187 U. S. 596, 604. As was said by the Supreme Court of the State with respect to memberships deemed to be essentially similar: "A membership has a use value and a buying and selling or market value. It is bought and sold. . . . There is a lien upon it for balances due members. . . . It passes by will or descent and by insolvency or bankruptcy. . . . It is true that there are certain restrictions in the ownership and use of a membership. These may increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property." *State* v. *McPhail*, 124 Minnesota, 398, 401. Of course, there is nothing in the Federal Constitution which prevents the memberships here involved from being taxed, and the question whether they were in fact taxable under the statutes of the State was a matter of local law with which we are not concerned. It was the province of the state court to determine what the terms of the taxing statute authorized and it is for this court to say whether in view of the operation of the statute, as thus defined, it overrides the Federal right which is claimed. *Clement National Bank* v. *Vermont*, 231 U. S. 130, 134. It is insisted that there was no legislative

authority for an official listing of this kind of property, or for an official estimate of its value, and hence that there is no valid taxing scheme. But it is manifest that the state court, in holding the memberships to be embraced within the description of property subject to taxation under the statutes, also held that the statutory scheme, including the provision for listing and for official valuation, did apply to these memberships. See 124 Minnesota, pp. 404–406. Complaint is made that in the present case the memberships were assessed under the head of "Moneys and Credits." But this is an administrative matter which does not touch the fundamentals contemplated by the Fourteenth Amendment. If there was any error or irregularity in the particular application of the state statute in the case of the assessments in question, it was subject to correction according to the local practice; and the argument that the statute is defective because there is no legislative authority for listing and estimate we think is directly opposed to the construction placed upon the statute by the state court. It is also apparent that there is no merit in the objection that there was a violation of the Federal Constitution through what is called double taxation. The membership, as property, was distinct from the assets of the corporation. *Van Allen* v. *Assessors*, 3 Wall. 573, 584; *Farrington* v. *Tennessee*, 95 U. S. 679, 687; *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; and see *St. Louis Southwestern Ry.* v. *Arkansas*, 235 U. S. 350, 367, 368. The correct valuation of the membership, in view of all relevant facts, was a matter for the taxing officials, and we do not sit to review their judgment. The complaint makes no case whatever of a denial by the statutory scheme of proper opportunity for the hearing of grievances where the estimate is regarded by the members as excessive. See *Brooklyn City R. R.* v. *New York*, 199 U. S. 48, 51, 52; *Orient Ins. Co.* v. *Board of Assessors*,

221 U. S. 358, 360. On the contrary, the complaint alleges that the plaintiff duly appeared before the Board of Equalization of the City of Minneapolis and the Minnesota Tax Commission, acting as the State Board of Equalization, and on behalf of himself and other members asked to have the assessment canceled, or, if not canceled, to have it reduced to what was asserted to be a fairer valuation, and that the Boards were each apparently inclined to grant the application, but, as it would seem, withheld action pending the decision of the courts as to the taxability of the memberships.

There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other States. It is urged that the memberships are intangible rights held by the member at his domicile. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located. *Tappan* v. *Merchants Bank*, 19 Wall. 490, 499; *New Orleans* v. *Stempel*, 175 U. S. 309, 319; *State Board* v. *Comptoir National*, 191 U. S. 388, 403; *Corry* v. *Baltimore*, 196 U. S. 466, 474; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 402; *Liverpool Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354, 355; *Hawley* v. *Malden*, 232 U. S. 1, 12.

With respect to discrimination, there is no tenable objection because of the exemption from taxation (if they were exempt) of the various organizations to which the plaintiffs in error refer,—such as the "Associated Press,

lodges, fraternal orders, churches, etc." The description itself suggests manifest distinctions which the State is entitled to observe in its taxing policy, despite the general allegation that these associations stand "in a similar position." The State has a broad discretion as to tax exemptions (*Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, 237), and the averments of the complaint are very far from showing any basis for a charge of violation of the Fourteenth Amendment by unwarrantable discrimination. And, finally, with respect to the argument that the plaintiffs in error were denied due process of law because the state court decided the case upon the authority of the *McPhail Case*, without referring to the asserted distinctions between the two cases, it is enough to say that the cause was heard and determined, and, viewing the judgment as passing upon all the Federal questions raised, we find no error.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the writ of error should be dismissed.

UNITED STATES *v.* MORRISON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 138. Argued December 15, 1916.—Decided February 21, 1916.

The State of Oregon did not, under § 4 of the Act of February 14, 1859, c. 33, 11 Stat. 383, take title to sections 16 and 36, thereby granted prior to survey; but, until defined by survey and title had vested in the State, Congress had power to dispose of them on compensating the State for the resulting deficiency.

Surveying the public lands is an administrative act, confided by statute

to designated officers of the United States who have power to direct how the surveys shall be made; and, until all requirements shall have been fulfilled, a survey is not a completed official act.

Nothing in the Act of February 14, 1859, or in Rev. Stat., § 2275, as amended by the Act of February 28, 1891, operated to pass title to the State of Oregon of sections 16 and 36 at any intermediate stage of the survey, or imposed any limitations on the authority of Congress to dispose of such lands before title passed to the State upon a survey duly completed according to authorized regulations of the Land Department.

A survey is incomplete until formally approved by the Commissioner; and even though approved without modification it does not so relate back to the date of the grant or of the field survey as to destroy the power of Congress to dispose of the land while unsurveyed.

Authority to establish the Cascade Range Forest Reservation given to the President by the Acts of March 3, 1891, and June 4, 1897, included the power to make temporary withdrawals, and a properly made order of the Secretary of the Interior withdrawing lands must be regarded as an act of the President.

The disposition of public lands by the President under the authority of Congress is a disposition by Congress.

The exception in the proclamation of January 15, 1907, enlarging the Cascade Range Forest Reserve did not include sections 16 and 36 in townships in Oregon referred to in § 4 of the Enabling Act of 1859 but which had not been included in a completed survey.

The statutory provisions for forest reservations refer to any lands which are subject to disposition of Congress whether surveyed or not.

Quære whether a State may await the extinguishment of a forest reserve which includes lands granted, but title to which will not vest until completed survey, and after such extinguishment take the granted lands.

212 Fed. Rep. 29, reversed.

THE facts, which involve the construction of provisions in Federal statutes relating to sections 16 and 36 granted to the State of Oregon, are stated in the opinion.

Mr. Mark Norris, with whom *Mr. Oscar E. Waer* and *Mr. Richard Sleight* were on the brief, for appellees:

The grant was a grant *in præsenti*. *Ham* v. *Missouri*, 18 How. 126; *Beecher* v. *Wetherby*, 95 U. S. 517; *United States* v. *Thomas*, 151 U. S. 577, 583; *Alabama* v. *Schmidt*,

232 U. S. 168; *United States* v. *Tully*, 140 Fed. Rep. 904; *Heydenfeldt* v. *Daney*, 93 U. S. 634; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Wisconsin* v. *Hitchcock*, 201 U. S. 202; *St. Paul* v. *Northern Pacific*, 139 U. S. 5; *United States* v. *Oregon & Calif. R. R.*, 176 U. S. 28; *Butz* v. *Northern Pacific*, 119 U. S. 55; *Southern Pacific* v. *United States*, 168 U. S. 1; *United States* v. *Southern Pacific*, 146 U. S. 570; *Menotti* v. *Dillon*, 167 U. S. 703; *Mo., Kan. & Tex. Ry.* v. *Cook*, 163 U. S. 191; *N. Y. Indians* v. *United States*, 170 U. S. 1; *Wright* v. *Roseberry*, 121 U. S. 488, 501; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559, 570; *Chandler* v. *Mining Co.*, 149 U. S. 79, 91; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Rice* v. *Sioux City R. R.*, 110 U. S. 695; *Mich. Land Co.* v. *Rust*, 168 U. S. 589, 591.

If the grant was not *in præsenti*, title vested when the field survey was made. *Cooper* v. *Roberts*, 18 How. 173; *Hibberd* v. *Slack*, 84 Fed. Rep. 571.

If title had not vested upon the completion of the field survey, it did vest upon its approval by the surveyor general of Oregon. Endlick on Interp. Stat. (ed. 1888, § 85); *Platt* v. *Un. Pac. R. R.*, 99 U. S. 48, 63; *Smith* v. *Townsend*, 148 U. S. 490; *M. & O. R. R.* v. *Tennessee*, 153 U. S. 486, 502; *Dewey* v. *United States*, 178 U. S. 510, 520; *Burfenning* v. *Railroad*, 163 U. S. 323; *United States* v. *George*, 228 U. S. 14; *Daniels* v. *Wagner*, 237 U. S. 547; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618; *Davis* v. *Weibbold*, 139 U. S. 507, 529; *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161.

The official use of the plat as filed in the General Land Office constituted an approval of it, which binds the United States. *Wright* v. *Roseberry*, 121 U. S. 488, 501; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 144; *Cooper* v. *Roberts*, 18 How. 173.

Immediately upon the formal approval of the survey, the statutory reservation and grant originally made to Oregon destroyed the effect of the temporary withdrawal and vested title in the State. *Burfenning* v. *Railroad Co.*, 163 U. S. 323; *United States* v. *George*, 228 U. S. 14; *Daniels* v. *Wagner*, 237 U. S. 547; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618; *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161.

The lands had not been sold or otherwise disposed of when the survey was formally approved on January 31, 1906, and title therefore vested in the State of Oregon on that date, if not before. *Ham* v. *Missouri*, 18 How. 126; *Connelly* v. *State*, 85 Georgia, 348; *Platt* v. *Un. Pac. R. R.*, 99 U. S. 48; *Roberson* v. *State*, 100 Alabama, 37; *Maxwell* v. *State*, 140 Alabama, 131.

The alleged executive withdrawal of these lands made December 16, 1905, was of no force. *Wolsey* v. *Chapman*, 101 U. S. 769; *Wilcox* v. *Jackson*, 13 Pet. 498; *United States* v. *Blendauer*, 122 Fed. Rep. 703; *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Bardon* v. *Nor. Pac. Ry.*, 145 U. S. 535; *Barker* v. *Harvey*, 181 U. S. 481, 490; *Un. Pac. R. R.* v. *Harris*, 215 U. S. 338; *Barnard* v. *Ashley*, 18 How. 43; *Hosmer* v. *Wallace*, 97 U. S. 575; *Buxton* v. *Traver*, 130 U. S. 232.

The presidential proclamation of January 25, 1907, was of no force as far as the lands in question were concerned because (a) the proclamation did not affect these lands and (b) the proclamation expressly excepted the lands. *Bardon* v. *Nor. Pac. R. R.*, 145 U. S. 535; *Railroad* v. *Roberts*, 152 U. S. 114; *United States* v. *Blendauer*, 122 Fed. Rep. 703.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

The United States brought this suit to quiet title to lands in section 16, township 3 south, range 6 east, Willamette Meridian, Oregon. By the Act of February 14, 1859 (c. 33, 11 Stat. 383), for the admission of Oregon into the Union, it was provided (§ 4):

"That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. . . . *Provided, however,* That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

The propositions of the Enabling Act were accepted by the legislative assembly of the State of Oregon on June 3, 1859. 1 Lord's Oregon Laws, pp. 28, 29.

There was a stipulation of facts, in substance, as follows:

Prior to May 27, 1902, no survey of any kind had been made by the United States of the lands in question. On June 2, 1902, a field survey was made under the direction of the United States surveyor general of Oregon. This officer approved the survey on June 2, 1903, and on June 8, 1903, transmitted copies of plat of survey and filed notes to the Commissioner of the General Land Office. On October 13, 1904, the Commissioner informed the surveyor general that the deputy had failed to describe

the kind of instrument used in the execution of the work or to record any polaris or solar observations at that time, and that a supplemental report would be necessary. Additional field notes were transmitted to the Commissioner on September 8, 1905. The Commissioner accepted the survey on January 31, 1906. In view of reports of illegal settlement, it was directed that no entries should be allowed until further permission, as the survey was accepted 'for payment only.' The plat was received in the local land office on February 7, 1906. On November 16, 1907, the suspension was revoked and the surveyor general of Oregon was directed to place the plat on file in the local land office, and it was filed accordingly in substantially the same form in which it had been accepted by the surveyor general 'without change or correction.'

On December 16, 1905, the Secretary of the Interior "temporarily withdrew for forestry purposes from all forms of disposition whatsoever, except under the mineral laws of the United States, all the vacant and unappropriated public lands" within described areas which include the land in controversy. Notice of this withdrawal was given on December 19, 1905, to the register and receiver of the local land office. In taking this action the Secretary of the Interior and the Commissioner described the lands 'according to the rectangular system of Government survey.' On January 25, 1907, the President issued a Proclamation enlarging the Cascade Range Forest Reserve so as to include the section sixteen in question and other lands. This proclamation, by its terms, excepted "all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent." 34 Stat. 3270.

It was the contention of the Government that, by reason of the withdrawal by Executive Order for forestry purposes prior to the acceptance of the survey by the

Commissioner of the General Land Office, the title to the lands did not pass to the State under the school grant. The appellees claimed title under a conveyance from the State, its certificates of sale having been executed on October 10, 1906, and its deed on January 9, 1907. Decree in favor of the United States (*United States* v. *Cowlishaw*, 202 Fed. Rep. 317) was reversed by the Circuit Court of Appeals (*Morrison* v. *United States*, 212 Fed. Rep. 29), and the Government appeals to this court.

The first enactment for the sale of public lands in the western territory provided for setting apart section sixteen of every township for the maintenance of public schools (Ordinance of 1785; *Cooper* v. *Roberts*, 18 How. 173, 177); and, in carrying out this policy, grants were made for common school purposes to each of the public-land States admitted to the Union. Between the years 1802 and 1846 the grants were of every section sixteen,[1] and, thereafter, of sections sixteen and thirty-six.[2] In some instances, additional sections have been granted. In the case of Oregon, the following provision had been made in establishing the Territorial Government (Act of August 14, 1848, c. 177, § 20, 9 Stat. 323, 330):

"That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each

[1] Ohio (2 Stat. 175); Louisiana (2 Stat. 394, 5 Stat. 600); Indiana (3 Stat. 290); Mississippi (2 Stat. 234, 10 Stat. 6); Illinois (3 Stat. 430); Alabama (3 Stat. 491); Missouri (3 Stat. 547); Arkansas (5 Stat. 58); Michigan (5 Stat. 59); Florida (5 Stat. 788); Iowa (5 Stat. 789); Wisconsin (9 Stat. 58).

[2] California (10 Stat. 246); Minnesota (11 Stat. 167); Oregon (11 Stat. 383); Kansas (12 Stat. 127); Nevada (13 Stat. 32); Nebraska (13 Stat. 49); Colorado (18 Stat. 475); North Dakota, South Dakota, Montana, and Washington (25 Stat. 679); Idaho (26 Stat. 215); Wyoming (26 Stat. 222), Utah (28 Stat. 109); Oklahoma (34 Stat. 272); New Mexico (36 Stat. 561); Arizona (36 Stat. 572).

township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

In 1850, Congress created the office of surveyor-general of the public lands in Oregon, and provided for survey and for donations to settlers (Act of September 27, 1850, c. 76, 9 Stat. 496, 499) and this act provided (§ 9): "That no claim to a donation right . . . upon sections sixteen or thirty-six, shall be valid or allowed, if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same." By the Act of February 19, 1851, § 1, c. 10 (9 Stat. 568), Congress authorized the legislative assemblies of the Territories of Oregon and Minnesota "to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six . . . reserved in each township for the support of schools therein." In 1853 (Act of Jan. 7, 1853, c. 6, 10 Stat. 150) the legislative assembly of Oregon was authorized "in all cases where the sixteen or thirty-six sections, or any part thereof, shall be taken and occupied under the law making donations of land to actual settlers" to select, "in lieu thereof, an equal quantity of any unoccupied land in sections, or fractional sections, as the case may be." And these provisions were followed in 1859 by the proposition of the Enabling Act (*supra*) accepted by the State of Oregon that these sections 'in every township of public lands' within the State, and 'where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.'

Prior to survey, the designated sections were undefined and the lands were unidentified. It is insisted by the

appellees that there was a grant *in præsenti*, under which the State acquired a vested right in the lands subject only to identification which would relate back to the date of the grant, and that "any sale or disposal" subsequent to that date "was illegal and void." It will be observed, however, that the language used is not that of a present grant. The expression is "shall be granted," and these words are used both with respect to the described sections and to the undefined indemnity lands which would be received in compensation for losses. In the latter case, there was obviously no present grant and none we think was intended in the former. Attention is called to the words 'herein granted' in the proviso of the Enabling Act, but this is a mere reference to what precedes and does not change, or purport to change, the terms of the donation. It must have been manifest to Congress, executing this definite policy with respect to the vast area of the public lands, that not improbably a long period would elapse in the case of numerous townships before surveys would be completed. Not only was it inevitable that upon survey there would be found to be fractional townships in which there would be either no section sixteen, or thirty-six, or only a portion of one or the other, but in various instances there might be prior claims, or actual settlements, or it might appear before surveys were had that there were important public interests which in the judgment of Congress should be subserved by some other disposition of lands of a particular character. On the other hand, it was not important to the State that it should receive specific lands, if suitable indemnity were given. It was in this situation that, in making its school grants to the public-land States, Congress provided that the described sections, or equivalent lands if the former in whole or in part had 'been sold or otherwise been disposed of,' should be granted. Whether or not provision had already been made for

the sale or disposition of public lands within the borders of the State at the time of its admission, the language of the school grant was substantially the same. And we think that its import is clear. The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress in making its compacts with the States did not undertake to warrant that the designated sections would exist in every township, or that, if existing, the State should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sections, the title to the lands should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose.

By the Act of May 20, 1826, c. 83 (4 Stat. 179), there had been provision made for compensation in the case of townships, and fractional townships, for which the stated appropriation for school purposes had not been made. In 1859, a further act was passed (Feb. 26, 1859, c. 58, 11 Stat. 385) to the effect that where settlement with a view to preëmption had been made "before the survey of the lands in the field" on sections sixteen or thirty-six, these sections should "be subject to the pre-emption claim of such settler." And it was added,—"if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by preëmptors; and other lands are also hereby appropriated to compensate deficiencies for school purposes where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by

reason of the township being fractional, or from any natural cause whatever." These lands were to be selected in accordance with the principles of adjustment defined in the Act of 1826. These provisions were incorporated in §§ 2275 and 2276 of the Revised Statutes. And the latter were amended by the Act of February 28, 1891, c. 384 (26 Stat. 796), which in part provided: "And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where section sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States." In this manner, Congress has undertaken to discharge its obligation by assuring to the States the equivalent of the school grant sections when these have 'been sold or otherwise been disposed of.'

The question now presented was not involved in *Ham* v. *Missouri*, 18 How. 126, or in *Cooper* v. *Roberts*, 18 How. 173. The former case related to the school grant to Missouri under the Act of March 6, 1820 (c. 22, 3 Stat. 545, 547). Ham had been indicted for waste and trespass on the sixteenth section of one of the townships, and his conviction was affirmed. In defense, he claimed title under a Spanish grant. This had been rejected by the Board of Commissioners in 1811, and it appeared that the United States had full power of disposition at the time of the donation to the State. Referring to the provision for the grant of equivalent lands, to take the place of those "sold or otherwise disposed of," the court said: "Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase 'or otherwise disposed of' must signify some disposition of the property equally efficient, and equally incompatible with any right in the State, present or potential, as deducible from the Act of 1820, and the ordinance of the same year." But in the case cited there

had been no such disposition. Reliance was placed by Ham upon an act of May 24, 1828 (6 Stat. 386) confirming the grant to his predecessors, but this confirmatory act explicitly provided that it should not "prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation." And it further appeared that the survey had been made of the land in question before the confirmatory act was passed (see 18 How., p. 134). In *Cooper* v. *Roberts*, *supra*, the plaintiff asserted title under the school grant made to Michigan (Act of June 23, 1836, c. 121, 5 Stat. 59). The section sixteen in controversy had been surveyed in 1847. Sale had been made by the State in February, 1851, and its patent had issued in November of that year. It was in 1850, after the lands had been surveyed, that the defendant's grantor had applied to the officers of the land office to enter the land, and the entry was allowed in 1852 with a reservation of the rights of Michigan, which the Secretary of the Interior deemed to be superior. It was in these circumstances, it being found that there was no legal impediment through any legislation, that the court held that the title had passed to the State.

In the case of *Heydenfeldt* v. *Daney Gold &c. Co.*, 93 U. S. 634, there had been a disposition of the land under the authority of Congress between the date of the school grant and the date of the survey. This case arose under the school grant to Nevada (Act of March 21, 1864, c. 36, 13 Stat. 30, 32), which was one of the exceptional instances where words of present grant were used, these however being qualified by the clause relating to sale or other disposition. The act provided: "That sections numbers sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto . . . shall be, and are hereby, granted to said State for the support of common schools." The plaintiff claimed under a patent

issued by the State of Nevada in 1868. The land was mineral land, and the defendant was in possession, carrying on the mining business, having obtained a patent from the United States under the acts of July 26, 1866 (c. 262, 14 Stat. 251), as amended, and May 10, 1872 (c. 152, 17 Stat. 91). The entry and claim of the defendant's predecessors in interest were made in 1867 prior to the survey of the section in question. It was held that the lands were subject to the disposition of Congress until the survey and its approval; and hence the judgment in favor of the defendant was affirmed. The words of present grant were deemed to be restricted by the words of qualification. The court said that it was intended to place Nevada "on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall,—and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the meantime, further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections. . . . Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left

free to legislate touching the national domain in any way it saw fit, to promote the public interests."

It is said that the Nevada school grant added the words "by any act of Congress" to the phrase "otherwise disposed of," and that the former words are not in the Oregon grant. But this does not mark a distinction, as "otherwise disposed of," of course, implies that the disposition shall be by competent authority. It is also urged that the court emphasized the fact that there had been no sale or disposition of the public lands in Nevada prior to the Enabling Act and therefore that the clause could refer only to future disposition; whereas, in the case of Oregon, there had been earlier provisions for the disposal of the public domain. But Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the States on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another; it covered other dispositions, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed. Nor is a distinction to be observed between mineral lands and other lands, if in fact Congress disposed of them. The validity of the disposition would not be affected by the character of the lands, although this might supply the motive for the action of Congress. We regard the decision in the *Heydenfeldt Case* as establishing a definite rule of construction.

In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in *Beecher* v. *Wetherby*, 95 U. S. 517. That was an action of replevin to recover logs cut on a section sixteen in Wisconsin which had been granted by the Enabling Act of Aug. 6, 1846 (c. 89, 9 Stat. 56, 58). The exterior lines of the township in which the land was

situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the State issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. "The fee was in the United States, subject to that right, and could be transferred by them whenever they chose." By the treaty of 1848 (9 Stat. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently, a portion of this reservation was assigned by another treaty to the Stockbridge and Munsee tribes, and for the benefit of the latter Congress passed the Act of February 6, 1871 (16 Stat. 404, c. 38) providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were cut. The court held that the title had vested in the State and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the compact with the State (the school grant) the lands were "withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted"; and that after this compact "no subsequent sale or other disposition . . . could defeat the appropriation." But it was also stated that "when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation." That is, the lands had been surveyed in 1854; prior to

that time, there had been no other disposition of the fee by the United States; the title had vested in the State subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the Act of 1871. What was said in the opinion must be considered in the light of the facts (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 394). The *Heydenfeldt Case* was not cited and cannot be regarded as overruled. See *New York Indians* v. *United States*, 170 U. S. 1, 18; *Minnesota* v. *Hitchcock*, 185 U. S. 375, 399–401.

The rule which the *Heydenfeldt Case* established has, we understand, been uniformly followed in the land office. After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to *Stockslager, Commissioner*, 6 L. D. 412, 417) that the school grant "does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor." And see, to the same effect, *Niven* v. *California*, 6 L. D. 439; *Washington* v. *Kuhn*, 24 L. D. 12, 13; *California* v. *Wright*, *Id.* 54, 57; *South Dakota* v. *Riley*, 34 L. D. 657, 660; *South Dakota* v. *Thomas*, 35 L. D. 171, 173; *F. A. Hyde*, 37 L. D. 164, 166; to *Atty. Gen. of Montana*, 38 L. D. 247, 250.

The case of *United States* v. *Thomas*, 151 U. S. 577, involved the Wisconsin school grant, the question being whether the Federal court in that State had jurisdiction to try an Indian charged with the murder of another Indian within the limits of section sixteen in a township forming part of an Indian reservation. It appeared that by treaty prior to the Enabling Act of 1846 the Indians had stipulated for the right of occupancy; that they had never been removed from the lands; and that, by treaty

of 1854, the particular reservation in question had been established. The lands were not surveyed until 1855. From any point of view it was clear that the title had never vested in the State, except as subordinate to the right of occupation of the Indians, and it was held that the Federal jurisdiction existed. *Minnesota* v. *Hitchcock*, *supra*, was a suit brought by the State to enjoin the Secretary of the Interior from selling any sections sixteen and thirty-six in the Red Lake Indian Reservation, the sales having been authorized by the Act of January 14, 1889 (c. 24, 25 Stat. 642) which was passed for the relief of the Chippewa Indians. The school grant to Minnesota was made by the Enabling Act of Feb. 26th, 1857 (c. 60, 11 Stat. 166, 167). The lands in question, however, were not surveyed until after the Act of 1889 had been passed and the agreement it contemplated had been made with the Indians. The court dismissed the bill of the State. It was held that when Congress undertook in 1889 "to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant"; but that Congress also "had the power to make arrangements with the Indians by which the entire tract would be otherwise appropriated. . . . Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the entire tract under a trust for its disposition in a particular way." The *Heydenfeldt Case* was cited with approval. Referring to the joint resolution passed by Congress on March 3, 1857 (c. 12, 11 Stat. 254) to the effect that in case of settlements on the sixteenth or thirty-sixth sections, their selection as town sites, or their reservation for public uses prior to survey, other lands should be selected in lieu thereof,

and to the contention of the State that the 'public uses' thus contemplated were 'governmental uses,' the court said: "It is unnecessary to rest upon a determination of this question. We refer to the resolution as an express declaration by Congress that the school sections were not granted to the State absolutely, and beyond any further control by Congress, or any further action under the general land laws. As in *Heydenfeldt* v. *Daney Gold &c. Co.*, *supra*, priority was given to a mining entry over the State's school right, so here, in terms, preference is given to private entries, town-site entries, or reservations for public uses. In other words, the act of admission with its clause in respect to school lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the Act of February 28, 1891, although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands 'where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

The case of *Wisconsin* v. *Hitchcock*, 201 U. S. 202, followed *United States* v. *Thomas*, *supra*, and *Minnesota* v. *Hitchcock*, *supra*. In *Alabama* v. *Schmidt*, 232 U. S. 168, there was no question as to the acquisition of title by the State. It was held that, assuming that the State had acquired title to the lands embraced in the school grant, it had authority to subject the lands in its hands to the ordinary incidents of other titles in the State, including that of adverse possession.

We conclude that the State of Oregon did not take title to the land prior to the survey; and that until the sections were defined by survey and title had vested in the State, Congress was at liberty to dispose of the land, its obligation in that event being properly to compensate the State for whatever deficiencies resulted.

The remaining question, then, is whether there had been a survey prior to an authorized withdrawal for forestry purposes. The surveying of the public lands is an administrative act confided to the control of the Commissioner of the General Land Office under the direction of the Secretary of the Interior. Act of July 4, 1836 (c. 352, 5 Stat. 107); Rev. Stat., § 453. It was competent for the Commissioner, acting within this authority, to direct how surveys should be made and to require that they should be subject to his examination and approval before they were filed as officially complete in the local land office. *Cragin* v. *Powell*, 128 U. S. 691, 697, 698; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 143, 144; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 177, 182; *Michigan Land Co.* v. *Rust*, 168 U. S. 589, 594. This was a continuing authority which was not suspended by the school grant to the State. The subsequent adoption of rules relating to surveys did not alter the terms of the grant, but these rules did control the administrative action which in view of the terms of the grant was necessary to make the grant effective. By order of April 17, 1879, the Commissioner required that surveyors-general should not "file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved" and the surveyors-general "officially notified to that effect." 37 L. D. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see *Tubbs* v. *Wilhoit*, *supra*); and it necessarily follows that the making of the field survey and its ap-

proval by the surveyor-general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner, and for that purpose copies of the plat of survey and field notes were transmitted to the Commissioner who, not being satisfied, required a supplemental report. The matter was still in abeyance when the lands in controversy were withdrawn for forestry purposes by the Secretary of the Interior on December 16, 1905. Reference is made to the terms of the Territorial Act of 1848 (*supra*) with respect to the reservation of the described sections when the lands were "surveyed . . . preparatory to bringing the same into market," but this provision furnishes no ground for the contention that an incomplete and unapproved survey was intended. Much less can it be said that under the grant of the Enabling Act of 1859 the title would pass at any intermediate stage of the survey. Nor is there merit in the contention that is based on § 2275 of the Revised Statutes as amended by the Act of February 28, 1891 (*supra*), protecting settlements when made "before the survey of the lands in the field." That act imposes no limitation upon the authority of Congress to dispose of the lands before title passes to the State; and if title passes upon survey, it must be upon a survey duly completed according to the authorized regulations of the Department. It is said, however, that in this case the plat was officially used by the Commissioner of the General Land Office and the Secretary of the Interior in connection with the withdrawal under consideration, and hence that the survey must be deemed to have been officially approved. *Wright* v. *Roseberry*, 121 U. S. 488, 517; *Tubbs* v. *Wilhoit*, *supra*. It is true that the lands withdrawn were conveniently described according to townships and that the official correspondence referred to an accompanying diagram showing the townships and sections. But neither the

correspondence nor the diagram contained any reference to a survey of the lands in question or constituted an approval of a survey. These lands still remained to be officially defined in the appropriate manner and according to the agreed statement the survey was accepted by the Commissioner of the General Land Office, as stated, on January 31, 1906, and was filed in the local land office on November 16, 1907, entries during the interval having been suspended pending certain investigations. We think that it is immaterial that the survey was finally approved by the Commissioner without modification, for pending the approval it remained in his hands, officially incomplete, awaiting the result of his examination. Again, it is urged that the survey when approved related back to the date of the grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of relation cannot be invoked to destroy this authority.

In establishing and enlarging the Cascade Range Forest Reserve, the President acted under the express authority conferred by the Acts of March 3, 1891, c. 561, § 24 (26 Stat. 1095, 1103), and June 4, 1897, c. 2 (30 Stat. 11, 36). The power to establish the permanent reservation included the power to make temporary withdrawals (*United States* v. *Midwest Oil Co.*, 236 U. S. 459, 476); and the order of the Secretary of the Interior made on December 16, 1905, must be regarded as the act of the President. *Wilcox* v. *Jackson*, 13 Pet. 498. The disposition by the President, under the authority of Congress, was a disposition by Congress.

It is finally contended that the Proclamation by the President on January 25, 1907, expressly excepted the lands in question. The exception was "of all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent." The evident purpose of the Proclamation was to confirm and make permanent the prior withdrawal for forestry purposes, not to override it. The very object of that withdrawal was to prevent claims of title from thereafter attaching to the lands. And the reference in the exception to 'any withdrawal or reservation,' as we view it, was to withdrawals or reservations by the Government itself for other and inconsistent uses and was with a view of avoiding confusion in governmental action, not to let in subsequently accruing claims of title under school grants as to which Congress had indicated its purpose to make compensation for deficiencies when lands which otherwise would have passed to the State thereunder had been duly taken for reservations. The contention that the lands were not 'public lands' until surveyed and hence were not subject to reservation by the President under the act of Congress is plainly without basis. See Rev. Stat., § 453. The provision for forest reservations refers to any part of the public lands which were subject to the disposition of Congress. It is also argued that the State under the Act of February 28, 1891 (*supra*), has the right to await the 'extinguishment' of the 'reservation' and the 'restoration of the lands therein embraced to the public domain,' and then to take the described sections. We are not called upon to consider any such question here, and we express no opinion upon it, as there has been no extinguishment of the reservation, and from any point of view it must be concluded that no title had passed to the State when it made the conveyance under which the appellees claim.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

ILLINOIS SURETY COMPANY *v.* UNITED STATES TO THE USE OF PEELER ET AL., TRADING AS FAITH GRANITE COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 176. Argued January 14, 1916.—Decided February 21, 1916.

Final settlement of a contractor's account within the meaning of the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, is not when the final payment is made, but is the final administrative determination by the proper authority of the amount due; in this case, *held* that a suit by a sub-contractor against the surety commenced six months after date of such determination, but less than six months after payment was not prematurely brought, no action having been brought meanwhile by the United States.

Where the action on the contractor's bond was brought within the proper time, an amendment made after the expiration of such time, which does not set up a new or different cause of action but merely corrects a defective statement, may be allowed. *Texas Cement Co.* v. *McCord*, 233 U. S. 157.

The contested liability of a surety on a contractor's bond is not to be determined in equity; the action under the act of 1894 as amended in 1905 is one at law.

If the surety does not contest, but pays into court the full amount of liability, discharging all liability as provided by the statute, the proceeding is simply one for distribution of a fund in court.

Where a sub-contractor was not one of the original plaintiffs and there was no intervention on its behalf, *held* that a judgment could not be rendered in its favor more than a year after final settlement of the contractor's claim; nor does the fact that one claiming, but not proving such claim, to be its assignee was made party plaintiff, amount to a sufficient and timely filing of the claim of such a sub-contractor.

215 Fed. Rep. 334, modified and affirmed.

THE facts, which involve the construction of the Materialmen's Acts, of 1894 and 1905, and the rights of sub-contractors thereunder, are stated in the opinion.

Mr. Bynum E. Hinton for plaintiff in error.

Mr. Benjamin E. Pierce and *Mr. D. W. Robinson*, with whom *Mr. John L. Rendleman* was on the brief, for defendants in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought by sub-contractors under the Act of August 13, 1894 (c. 280, 28 Stat. 278), as amended by the Act of February 24, 1905 (c. 778, 33 Stat. 811), in the name of the United States to recover upon a contractor's bond. The contract was for the construction of a post-office building in Aiken, South Carolina (Act of March 30, 1908, c. 228, 35 Stat. 526, 528), and the Illinois Surety Company (plaintiff in error) was the surety. The summons and complaint were filed on March 4, 1913. Motion to dismiss was made on September 22, 1913, upon the ground that the complaint did not allege that there had been a completion and final settlement of the contract between the contractor and the United States; or that there had been such completion and settlement more than six months, and within one year, prior to the commencement of the action.

Another ground for the motion was that the remedy under the statute was in equity. The motion was denied, the court permitting the complaint to be amended so as to allege that the contract was completed in July, 1912; that final settlement was made by the Treasury Department on August 21, 1912; and that no suit had been brought by the United States against the contractor and his surety within the six months' period. The defendant, reserving its objection to the order denying the motion and allowing the amendment, answered. Jury trial was waived by written stipulation and the case was heard by the district judge who found, in substance, the facts to be as follows:

That the building was completed, and on August 21, 1912, the Treasury Department "stated and determined the final balance" to be paid the contractor under the contract at the sum of $3,999.01; that this "adjustment and determination" was communicated to the contractor; that on August 26, 1912, a voucher of that date was prepared by the Department showing the balance, as above stated, to which the contractor appended his signature certifying the amount to be correct, and that on that day there was a definite acceptance by the contractor of the adjustment; that on September 11, 1912, a check for the above-mentioned sum was made out by the disbursing clerk of the Department, payable to the order of the contractor, who thereafter collected it; that upon the request of the relator (the Faith Granite Company) the Secretary of the Treasury, on January 16, 1913, furnished to it a certified copy of the contract and bond and that on the sixth day of March, 1913, . . . the present action was instituted by the filing . . . and by service of summons and complaint on defendant Surety Company." It also appeared that no action had been instituted by the United States upon the bond within the six months allowed by the statute.

The district court gave judgment for amounts found to be due to those for whose benefit the action was brought, and to certain intervenors, and this judgment was affirmed by the Circuit Court of Appeals. 215 Fed. Rep. 334. The contentions presented are: (1) That the action was instituted prematurely; (2) that the amendment of the complaint was improperly allowed; (3) that there was no right of action at law; and (4) that the court erred in giving judgment for the Carolina Electrical Company, one of the sub-contractors.

1. The statute provides, p. 812: "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit . . . be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States . . . against said contractor and his sureties, and to prosecute the same to final judgment and execution; *Provided*, That . . . it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." In *Texas Cement Co.* v. *McCord*,[1] 233 U. S. 157, we said that this act created a new right of action upon terms named; and hence that an action brought by creditors before six months had expired from the time of the 'completion and final settlement of the contract' could not be sustained. In the present case, the plaintiff in error insists that there was no final settlement within the meaning of the statute prior to the issue of the check

[1] The statute is set forth in full in the margin of the opinion in the case cited.

for payment to the contractor on September 11, 1912, and that in this view the action was brought too soon.

It was evidently the purpose of the Act of 1905 to remedy the defect in the Act of 1894 by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety and priority with respect to such demand. *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 538; *United States* v. *Robinson*, 214 Fed. Rep. 38, 39, 40. Accordingly it was provided that if the United States sued upon the bond, the described creditors should be allowed to intervene, and be made parties to the action, but subject "to the priority of the claim and judgment of the United States." And it was only in case the United States did not sue within the specified period that the creditors could bring their action. With this object in view—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (*Bryant* v. *N. Y. Steamfitting Co.*, 235 U. S. 327, 337)—it was natural that the time allowed exclusively for action by the Government should begin to run when the contract had been completed and the Government in its final adjustment and settlement according to established administrative methods had determined what amount, if any, was due. Then the Government would have ascertained the amount of its claim, if it had one, and could bring suit if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment, and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed.

The pivotal words are not 'final payment,' but 'final

settlement' and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. See *United States* v. *Illinois Surety Co.*, 195 Fed. Rep. 306, 309; *United States* v. *Bailey*, 207 Fed. Rep. 782, 784; *United States* v. *Robinson* (C. C. A., Second), *supra; United States* v. *Massachusetts Bonding Co.*, 215 Fed. Rep. 241, 244; *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep. 653, 662. The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. By the Act of September 2, 1789, c. 12 (1 Stat. 65), establishing the Treasury Department, the Comptroller was charged with the duty of examining 'all accounts *settled* by the auditor' (§ 3). And it was made the duty of the auditor to receive 'all public accounts and after examination to certify the balance,' subject to the provision that any person whose account should be so audited might appeal to the Comptroller 'against such *settlement.*' The Act of March 3, 1809, c. 28, § 2 (2 Stat. 536), gave authority to the Comptroller to direct the auditor forthwith "to *audit and settle* any particular account," which he was authorized to audit and settle and "to report such *settlement*" for his revision and final decision. (See Rev. Stat., § 271.) By the Act of March 3, 1817, c. 45, § 2 (3 Stat. 366) it was provided that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Treasury Department." This provision was carried into § 236 of the Revised Statutes. The words 'settled and adjusted' were taken to mean the determination in the Treasury Department for administrative purposes of the state of the account and the amount due. See 2 Op. Atty. Gen. 518; *Id.*, 625, 629, 630. Re-

ferring to this provision, it was said by Mr. Chief Justice Waite in delivering the opinion of the court in *Cooke* v. *United States*, 91 U. S. 389, 399: "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department'; and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority *to settle and adjust, that is to say, to determine upon the validity of, any claim against the government.* He can pay only after the adjustment has been made 'in the Treasury Department' and then upon drafts drawn for that purpose by the treasurer." Again, the Act of July 31, 1894, c. 174 (28 Stat. 162, 206–208), relating to the examination of accounts by auditors, and revisions of accounts, etc., provides, in § 8, that "the balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants or to the Postmaster-General upon the *settlements* of public accounts, shall be final and conclusive upon the Executive Branch of the Government," except that any person whose accounts may have been "*settled*," the head of the Executive Department, etc., to which the account pertains, or the Comptroller of the Treasury, may, within a year obtain a revision in the manner stated; also that "any person accepting payment under a *settlement* by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items from which payment is accepted," and, further, that "when suspended items are *finally settled* a revision may be had as in the case of the original settlement." By the Act of May 28, 1896, c. 252, § 4 (29 Stat. 140, 179), the Secretary of the Treasury was directed to make report annually to Congress of such officers as were found "upon *final settlement* of their accounts" to have been indebted to the Government

and to have failed to pay the amount of their indebtedness into the Treasury.

We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the Act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision.

In the present case, the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. Act of

June 6, 1902, c. 1036, 32 Stat. 310, 326. On August 21, 1912, the Supervising Architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of work on buildings under the control of that Department (Dept. Circ., No. 45, Sept. 12, 1912), is as follows: "The department treats as the date of final settlement mentioned in said acts" (referring to the Acts of 1894 and 1905, *supra*), "the date on which the department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly."

We conclude that the action was not brought prematurely.

2. With respect to the amendment of the complaint, it is apparent that as there was an existing right of action under the statute at the time the suit was brought, the case was not within the decision in *Texas Cement Co.* v. *McCord*, *supra*. No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations,

and in this there was no error. Rev. Stat., § 954; *Missouri, Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570, 576.

3. It is contended that the right given by the statute to the described creditors is of an equitable nature, and that the court erred in permitting recovery at law. The objection in the present case is merely technical, as the parties stipulated to waive trial by jury and the case was heard and decided by the district judge upon facts about which there is no dispute. The question has not been raised heretofore in this court, but it has been assumed in many cases that the action to be brought under the statute upon the contractor's bond, whether the action were instituted by the United States (*United States* v. *Congress Construction Co.*, 222 U. S. 199) or by creditors in the name of the United States, was an action at law. *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533; *Title Guaranty Co.* v. *Crane Co.*, 219 U. S. 24, 35; *Bryant* v. *N. Y. Steamfitting Co.*, 235 U. S. 327. In *Title Guaranty Co.* v. *Crane Co.*, *supra*, a question arose as to the propriety of allowing a docket fee to each claimant. Section 824 of the Revised Statutes provides for a docket fee of $10 "in cases at law, when judgment is rendered without a jury." The court said: "The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat., § 824. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit." In the circuit and district courts and in the circuit courts of appeals, while it seems that objection has rarely been made, there has been almost complete uniformity in treating the creditors' action under the Act of 1905 as one at law. See *United States* v. *Winkler*, 162 Fed. Rep. 397; *Stitzer* v. *United States* (C. C. A., Third), 182 Fed. Rep. 513; *United States* v. *Boomer* (C. C. A., Eighth), 183 Fed. Rep. 726; *United States* v. *Illinois Surety Co.*, 195 Fed. Rep. 306; *Baker Contract Co.* v.

United States (C. C. A., Fourth), 204 Fed. Rep. 390; *Eberhart* v. *United States* (C. C. A., Eighth), 204 Fed. Rep. 884; *United States* v. *Bailey*, 207 Fed. Rep. 783; *Vermont Marble Co.* v. *National Surety Co.* (C. C. A., Third), 213 Fed. Rep. 429; *United States* v. *Robinson* (C. C. A., Second), 214 Fed. Rep. 38; *United States* v. *Massachusetts Bonding Co.*, 215 U. S. 241; *United States* v. *Emery*, 225 Fed. Rep. 287; *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep. 653. It was expressly held to be an action at law in *United States* v. *Stannard* (D. C., N. D., N. Y.), 207 Fed. Rep. 198, 202. The contrary conclusion was reached in *United States* v. *Wells* (D. C., E. D., Tenn.), 203 Fed. Rep. 146, 147; *Illinois Surety Co.* v. *United States* (C. C. A., Second), 212 Fed. Rep. 136, 139, and *United States* v. *Scheurman* (D. C., Idaho), 218 Fed. Rep. 915, 919. The point was raised on rehearing in *United States* v. *Illinois Surety Co.* (C. C. A., Seventh), 226 Fed. Rep., pp. 653, 663, 664, but, as it came too late, it was not decided.

The statute provides that the bond shall have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." In this respect, the provision is substantially the same as that contained in the Act of 1894, and the obligation in favor of the materialmen and laborers has been held to be a distinct obligation. *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 423, 425; *Hill* v. *Am. Surety Co.*, 200 U. S. 197, 201, 202. It is an obligation for the payment of money to the persons described, which they are entitled to enforce. The nature of the obligation is not changed by the fact that there is to be but one action. If the United States brings the action the persons described are entitled to be made parties and "to have their rights and claims adjudicated in such action and judgment rendered

thereon." If the United States does not sue within the time specified, they may bring action on the bond in the name of the United States and "prosecute the same to final judgment and execution." Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action. *Title Guaranty Co.* v. *Crane Co.*, *supra*. The obligation of the surety thus enforced in a single action is a legal obligation to the United States for the use and benefit of the several claimants. We do not regard the requirements that "the claim and judgment of the United States" shall have priority, and that the aggregate recovery shall not exceed the penalty of the bond, as insuperable obstacles to proceeding at law. It is the case of an undertaking for the payment of many claims, not to exceed the specified penalty. If the total amount due exceeds the penalty of the bond, it is provided that "judgment shall be given to each creditor *pro rata* of the amount of the recovery." This, however, merely requires an arithmetical calculation after the different causes of action have been passed upon and the amount due upon each determined. We see no ground upon which the conclusion can be justified that the liability of the surety on its bond is to be determined in equity. The contrary has been the generally accepted and, we think, the correct practice.

It should be added that a different situation would arise if the surety, availing itself of the statutory privilege, should pay into court the full amount of its liability, to wit, the penalty on the bond, for distribution. In that case the legal obligation of the surety would be discharged by the express terms of the statute and the proceeding would be simply for the distribution of a fund in court.

4. The plaintiff in error contends that the court erred in giving judgment in favor of the Carolina Electrical Company. The record shows that among those named as the persons instituting the action was the "Electrical

Engineering and Contracting Company, assignee of Joseph B. Cheshire, Jr., receiver of the Carolina Electrical Company." The complaint set forth that the Carolina Electrical Company (a North Carolina corporation) had furnished to the contractor certain material and labor for which there remained unpaid the sum of $498.69; that on October 4, 1912, Joseph B. Cheshire, Jr., was appointed receiver of that company; and that on March 1, 1913, its claim had been "assigned and transferred for value" to the above-named plaintiff by the receiver, and that the plaintiff was the sole owner of the account and had succeeded to all the rights incident thereto which had belonged to the Carolina Electrical Company. The alleged transfer was denied. Evidence was introduced to show the incorporation, and the appointment of the receiver. The district judge found that the order proved was insufficient to establish the authority of the receiver to assign the claim, but held that the proceeding in the case was a sufficient filing of the claim on behalf of the Carolina Electrical Company. Judgment was awarded in favor of that company with direction that it should be paid "only to such person as may be authorized by law to receive it for said Carolina Electrical Company," and the judgment to this effect was affirmed.

In this, we think the court erred. The Carolina Electrical Company was not one of the plaintiffs and there was no intervention on its behalf. The trial court in its findings sets forth the interventions of certain other parties and states that no more interventions appear to have been filed in the cause. It is true, of course, that the real party in interest who is entitled to enforce the cause of action may be substituted as plaintiff. See *McDonald* v. *Nebraska*, 101 Fed. Rep. 171, 178. But the present case is not one of misnomer, or of a nominal plaintiff for whom the real party in interest is substituted, or indeed of any proper substitution. The plaintiff, the Electrical En-

gineering & Contracting Company was not a nominal party, nor was the action in any sense brought for the benefit of the Carolina Electrical Company. The record shows that it was brought, so far as this claim is concerned, solely for the benefit of the Electrical Engineering & Contracting Company upon the allegation that the claim had been assigned to it for value and that it was the exclusive and beneficial owner. According to the record, the Carolina Electrical Company was not made a party at any stage of the action unless this was accomplished by the decision and the judgment. But at the time of the decision, November 10, 1913, by reason of the express limitation of the statute, it was too late for that company to intervene.

The judgment is modified by striking out the provision in favor of the Carolina Electrical Company, and as thus modified is affirmed.

Judgment affirmed.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY *v.* BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 450. Submitted January 7, 1916.—Decided February 21, 1916.

The State cannot lay a tax on interstate commerce in any form by imposing it either upon business constituting such commerce or on the privilege of engaging in it, or upon the receipts as such derived therefrom.

Whether a state tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause depends upon the operation and effect of the tax as enforced and

not upon the manner in which the taxing scheme has been characterized.

The State has authority to tax a domestic corporation for the privilege of being a corporation, and such a tax is not necessarily invalid because measured by the capital stock, part of which may represent capital not subject to the taxing power of the State.

A State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation may be engaged in interstate commerce.

The validity of each tax must be decided upon its own facts, and a tax within the taxing power of the State will not be condemned as repugnant to the Federal Constitution unless its natural operation and effect render it a prohibited exaction.

The tax imposed by chapter 135, Kansas Laws of 1913, on the privilege of being a corporation is not laid upon interstate commerce or receipts therefrom or fluctuating with the volume of interstate business, but is simply graduated according to paid up capital with a reasonable maximum; and it is not, as to a domestic corporation engaged in both interstate and intrastate commerce, invalid either as a violation of the commerce clause as taxing interstate commerce or of the due process clause of the Fourteenth Amendment, as taxing property beyond the jurisdiction of the State.

95 Kansas, 261, affirmed.

THE facts, which involve the constitutionality under the commerce and due process clauses of the Federal Constitution and the construction of the statute of Kansas of 1913 imposing annual taxes on corporations, are stated in the opinion.

Mr. R. R. Vermilion and *Mr. W. F. Evans* for plaintiff in error:

The tax involved is not in lieu of property tax. The statute provides no method for ascertaining proportion of stock of domestic corporations devoted to Kansas business. The statute imposes a burden on interstate commerce and seeks to tax property beyond the jurisdiction of the State of Kansas. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 31.

There is no distinction between foreign and domestic

corporations. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 36; *Phila. & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146.

A corporation may pay under protest and recover taxes. *Atchison, Topeka &c. Ry.* v. *O'Connor*, 223 U. S. 280.

This court cannot reshape the statute. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *United States Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Crane Co.* v. *Looney*, 218 Fed. Rep. 260, can be distinguished and do not apply.

The statute denies due process and equal protection of the laws.

Mr. S. M. Brewster, Attorney General of the State of Kansas, *Mr. James P. Coleman*, *Mr. W. P. Montgomery* and *Mr. J. L. Hunt* for defendant in error:

The act in question, as applied to plaintiff in error, does not regulate or burden interstate commerce. It imposes an excise tax upon the right or privilege of the plaintiff in error to exist as a corporation under the laws of the State. *Railway Co.* v. *Sessions*, 95 Kansas, 261; *Society for Savings* v. *Coite*, 6 Wall. 594; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632; *Provident Inst. for Savings* v. *Massachusetts*, 6 Wall. 611; *Home Ins. Co.* v. *New York*, 134 U. S. 594.

The State has full power to impose such a privilege tax. Cases *supra* and *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Philadelphia R. R.* v. *Pennsylvania*, 15 Wall. 284; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Minot* v. *Railway Co.*, 18 Wall. 206.

Such a franchise tax, if otherwise valid, may be computed or measured in amount by the amount of the capital stock of the corporation employed in part in carrying on

interstate commerce. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68.

The statute imposing the tax provides that the amount to be paid for the privilege for which it is required shall be determined by reference to the capital employed in exercising that privilege, and such capital, or the property in which such capital is invested, is not itself taxed. *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549.

The statute in question, as applied to domestic railway corporations, does not burden interstate commerce. *Philadelphia R. R.* v. *Pennsylvania*, 15 Wall. 284; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Minot* v. *Railway Co.*, 18 Wall. 206; *Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Ashley* v. *Ryan*, 153 U. S. 436; *Railroad Co.* v. *Maryland*, 21 Wall. 456.

The question involved is not within the rule of law determined in *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; see *Railway Co.* v. *Sessions*, 95 Kansas, 261.

The other cases cited by plaintiff in error can be distinguished.

There is no denial of due process or equal protection of the laws.

Mr. Justice Hughes delivered the opinion of the court.

By Chapter 135 of the Laws of 1913, of Kansas, every domestic corporation is required to pay to the Secretary of State an annual fee which is graduated according to the amount of its paid-up capital stock. When this capital stock does not exceed $10,000, the fee is $10; when it exceeds $10,000 but is not over $25,000, the fee is $25; and there are further increases, graduated as stated, until the maximum fee of $2,500 is reached, that sum

being payable in all cases where the paid-up capital stock exceeds $5,000,000. The plaintiff in error is a railroad corporation organized under the laws of Kansas, and its road extends into several States. It has a paid-up capital stock of $31,660,000. On March 31, 1914, it paid to the Secretary of State, under protest, the required fee of $2,500 and brought this action to recover the amount, insisting that the tax is a direct burden upon interstate commerce and is laid upon property outside the State, and hence is invalid under the Federal Constitution. The Supreme Court of Kansas sustained the tax, thus defining its nature: "The fee collected is a tax upon the right of corporate existence—the franchise granted by the State to be a corporation—to do business with the advantages associated with that form of organization." 95 Kansas, 261.

It must be assumed, in accordance with repeated decisions, that the State cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. *State Freight Tax Cases*, 15 Wall. 232; *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, 344; *Leloup* v. *Mobile*, 127 U. S. 640; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *McCall* v. *California*, 136 U. S. 104; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217, 228; *West Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 36, 37; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 65; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 83. And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized. *Galveston, Harrisburg &c. Ry.*

v. *Texas, supra; U. S. Expr. Co.* v. *Minnesota*, 223 U. S. 335, 346; *St. Louis Southwestern Ry.* v. *Arkansas*, 235 U. S. 350, 362.

Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania, supra; Ashley* v. *Ryan*, 153 U. S. 436; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 559, 560. And, agreeably to the priniciple above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant

to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Mining Co.* v. *Massachusetts*, *supra*), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.

In *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, *supra*, the State had laid "a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation." As the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between States and foreign countries, and from the charter of its vessels which was for the same purpose." It was necessarily concluded that the tax was imposed upon interstate commerce. In *Galveston, Harrisburg &c. Ry.* v. *Texas*, *supra*, the tax upon the railroad company was "equal to one per centum of its gross receipts." The court held that this was "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" By the statute which was under review in *West Un. Tel. Co.* v. *Kansas*, *supra*,—as was said in *Flint* v. *Stone Tracy Co.*, 220 U. S., p. 163, summarizing that case—the State "undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in

commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid." To the same effect were *Pullman Co.* v. *Kansas, supra,* and *Ludwig* v. *West Un. Tel. Co.,* 216 U. S. 146. The act before the court in *Meyer* v. *Wells, Fargo & Co., supra,* which provided for what was called a "gross revenue tax," was deemed to be "so similar to the Texas statute held bad" in the case of *Galveston, Harrisburg &c. Ry.* v. *Texas,* as to deserve a similar condemnation. On the other hand, in *U. S. Exp. Co.* v. *Minnesota, supra,* it appeared that the reference to gross receipts was only intended fairly to measure a tax upon a subject within the taxing power of the State, and the tax was sustained. And, in the case of *Baltic Mining Co.* v. *Massachusetts, supra,* where a tax on foreign corporations was measured by the authorized capital stock and was limited to $2,000, the court also reached the conclusion "that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce," and that hence the legislation was within the authority of the State. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporations before the court were "sold and shipped in interstate commerce," and that to that extent they were "engaged

in the business of carrying on interstate commerce" and were "entitled to the protection of the Federal Constitution against laws burdening commerce of that character." It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a direct burden upon interstate commerce that the tax was upheld. 231 U. S., pp. 68, 86, 87.

In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax—on the privilege granted by the State of being a corporation—and while it is graduated according to the amount of paid-up capital stock the maximum charge is $2,500 in the case of all corporations having a paid-up capital of $5,000,000, or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce.

For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the State. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all.

Judgment affirmed.

LUSK ET AL., RECEIVERS OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *v.* BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 451. Submitted January 7, 1916.—Decided February 21, 1916.

The objections to the constitutionality of the provisions of ch. 135, Kansas Laws of 1913, taxing foreign corporations doing business in Kansas for such privilege measured on the proportion of its stock used in that State, resting in this case exclusively on the asserted invalidity under the commerce and due process clauses of similar provisions of the same statute in regard to domestic corporations doing interstate and intrastate business, and those objections having been found untenable (*Kansas City & Fort Scott Ry.* v. *Kansas*, *ante*, p. 227), the sole basis of attack on such provisions as to foreign corporation fails and they cannot be held unconstitutional in this action. 95 Kansas, 271, affirmed.

THE facts, which involve the constitutionality under the Federal Constitution and the construction and application of the statute of Kansas of 1913 imposing taxes on foreign corporations, are stated in the opinion.

Mr. R. R. Vermilion and *Mr. W. F. Evans* for plaintiff in error.

Mr. S. M. Brewster, Attorney General of the State of Kansas, *Mr. James P. Coleman*, *Mr. W. P. Montgomery* and *Mr. J. L. Hunt* for defendants in error.

Mr. Paul E. Walker filed a brief on behalf of the Chicago, Rock Island & Pacific Railway, as *amicus curiæ* by leave of the court.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiffs in error, the receivers of a railroad corporation organized under the laws of the State of Missouri, brought this action to recover the sum of $2,500, alleged to have been paid under protest to the Secretary of State of the State of Kansas as a tax upon foreign corporations imposed by Chapter 135 of the Laws of 1913. A general demurrer to the petition was sustained, and, as the plaintiff declined to plead further, judgment was rendered in favor of the defendant. This judgment was affirmed by the Supreme Court of the State. 95 Kansas, 271.

The act above mentioned (§ 2) requires "every foreign corporation, for profit, now or hereafter doing business in this State, and owning or using a part or all of its capital in this State, and subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas" to make annual report, setting forth certain facts, to the Secretary of State. It is further provided that "upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business." The amount of the fee is graduated according to the amount of the issued capital stock "used in Kansas." The minimum annual fee is $10, when the issued capital stock so used does not exceed $10,000; and the maximum annual fee is $2,500, when the issued capital stock so used exceeds $5,000,000.

Construing these provisions of the act, and answering the objection that as to a railroad company, and other foreign corporations, doing both a local and an interstate business, the act was invalid because it undertook to regulate interstate commerce, the Supreme Court of Kansas said in *State* v. *Sessions*, 95 Kansas, 272, 275:

"The requirements of the statute are imposed on such foreign corporations doing business in this State as are 'subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas.' (§ 2.) Corporations which are engaged solely in interstate commerce are therefore wholly exempt from all its provisions, and those which do both an interstate and an intrastate business are exempt so far as concerns the former. The phrases 'that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business' (§ 2), and 'the issued capital stock used in Kansas,' refer to the amount of capital invested in doing a purely local business. The total capital of the company is involved only as a basis for arriving at a reasonable estimate of the capital devoted to transportation originating and ending in Kansas."

In the instant case, the objections to the tax upon the foreign corporation rest entirely upon the asserted invalidity of the tax imposed by the same statute upon domestic corporations; it is insisted that the foreign corporation had complied with statutory conditions entitling it to be treated not less favorably, and that, if the tax laid by the statute upon domestic corporations is invalid, the tax laid upon the foreign corporation cannot be sustained. Apparently, no other contention was presented to the Supreme Court of the State (95 Kansas, 271). And, accordingly, in the brief of the plaintiffs in error in this court, the questions involved are stated to be: (a) that the act under which the tax was demanded is unconstitutional because "when applied to railroad

companies organized under the laws of the State of Kansas," owning lines extending into other States, the act places a burden upon interstate commerce and undertakes to tax property outside the State; (b) that the act seeks "to place a tax upon the entire capital stock of domestic corporations owning and operating railroads in Kansas and other States," that it thereby attempts to tax property outside the State in contravention of the Fourteenth Amendment, and that it "is therefore void as to domestic corporations"; and (c) that the compliance by the Missouri corporation (of which the plaintiffs in error are receivers) with the terms of Chapter 186 of the Laws of 1887, of Kansas, "constituted a contract between the railroad company and the State, by which the State bound itself not to subject the railroad company or the plaintiffs in error to any greater liabilities than those imposed upon railroad corporations organized under the laws of Kansas, and conferred upon such foreign corporation complying with said act 'all the rights, privileges and franchises' of Kansas railroad corporations;" and that it follows that, if the tax act is unconstitutional as to domestic corporations, the imposition of the tax in question upon the Missouri corporation "would violate the obligations of the contract" and would deny to it "the equal protection of the laws."

In the case of *Kansas City, Fort Scott & Memphis Ry.* v. *Kansas*, decided this day, *ante*, p. 227, we have considered the arguments against the tax imposed by the statute upon domestic corporations, and we have found the objections to be untenable. Thus, the sole basis for the attack made by the plaintiffs in error upon the statute fails, and the judgment must be affirmed.

Judgment affirmed.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY *v.* SHEPHERD.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 160. Submitted January 12, 1916.—Decided February 21, 1916.

A Federal question which is first set up and asserted in a petition for rehearing in the highest court of the State which was not entertained but denied without passing upon the Federal question is not open to consideration here.

In an action for damages for unreasonable delay in transporting a shipment of cattle, in interstate commerce, where the question in dispute was whether the transportation could have reasonably been completed within the thirty-six hours maximum limit under the Federal statute, the court charged the jury that the carrier could not keep the stock in the cars longer than such period, and that if it was not reasonably possible to complete the journey within that time the carrier was not responsible for delay caused by unloading the stock for rest, water and feed, and no exceptions having been reserved or modifications suggested, or other instructions requested, *held*, that assignments of error based on failure to give due effect to the Federal statute are so devoid of merit as to be frivolous and the writ of error should be dismissed.

Writ of error to review, 40 Oklahoma, 589, dismissed.

THE facts, which involve the jurisdiction of this court under § 237, Jud. Code, are stated in the opinion.

Mr. W. F. Evans, *Mr. R. A. Kleinschmidt* and *Mr. E. H. Foster* for plaintiff in error.

Mr. J. B. Thompson for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action for damages resulting, as was alleged, from unreasonable delay in transporting cattle from Fort

Worth, Texas, to Kansas City, Missouri, in May, 1909. The plaintiff had a verdict and judgment and the latter was affirmed. 40 Oklahoma, 589. The errors assigned are that due effect was not given to certain provisions of the Carmack Amendment to the Interstate Commerce Act (§ 7, c. 3591, 34 Stat. 584, 595) or to the act limiting the time that cattle in interstate transit may be confined in cars without being unloaded for rest, water and feed, June 29, 1906, c. 3594, 34 Stat. 607.

The claim under the Carmack Amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the Supreme Court of the State. The petition was not entertained, but was denied without passing upon the Federal question thus tardily raised. That question therefore is not open to consideration here. *Pim* v. *St. Louis*, 165 U. S. 273; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 308; *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399; *Consolidated Turnpike Co.* v. *Norfolk &c. Ry.*, 228 U. S. 326, 334.

The claim made under the other act was, that part of the delay was excusable, because the transportation reasonably could not have been completed within the maximum time—thirty-six hours—during which the cattle could be confined in the cars and it therefore became necessary under the act to unload them for rest, water and feed for at least five hours, as was done. Whether the transportation reasonably could have been completed within thirty-six hours was the subject of direct and conflicting testimony and was committed to the jury as a question of fact. In that connection the court said to the jury: "You are instructed that under the laws of the United States the defendant company could not keep the stock in this shipment in the cars longer than thirty-six hours and if you find from the evidence that it was not reasonably possible that the shipment should reach Kansas City

within the thirty-six hour limit, then it is not liable for the delay caused by the unloading of the stock." No exception was reserved to this instruction, no modification of it was suggested and no other instruction upon the subject was requested. It therefore is apparent that the assignments based upon this statute are so devoid of merit as to be frivolous.

Writ of error dismissed.

EMBREE *v.* KANSAS CITY AND LIBERTY BOULEVARD ROAD DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 187. Argued January 18, 19, 1916.—Decided February 21, 1916.

Where a taxing district is not established by the legislature, but by exercise of delegated authority, there is no legislative decision that its location, boundaries and needs are such that the lands therein are benefited, and it is essential to due process of law that the landowners be accorded an opportunity to be heard on the question of benefits.

Where a statute delegating authority for establishment of taxing districts provides for a hearing on the question of benefits, the decision of the designated tribunal is sufficient; and, unless made fraudulently or in bad faith, due process is not denied.

A statute requiring adequate public notice of the time and place of presentation of the petition for the creation of a tax district and providing for presentation of remonstrances with power to the designated tribunal to hear the petition and remonstrances and to make such changes in the boundaries of the proposed district as the public good may require, not only contemplates a hearing, but authorizes the tribunal to so adjust the boundaries as to include

only such lands as may reasonably be expected to be benefited by the improvement.

There is an inseparable union between the public good and due regard for private rights.

An adequate hearing may be had before a delegated tribunal authorized to establish taxing districts for roads and to declare what lands shall be included therein as being benefited and due process of law accorded to the owners, although the particular roads to be improved may not have been designated.

A legislative act establishing zones of benefits with graduated ratings for assessments in districts lawfully created does not deny due process of law where it does not provide for a hearing on this particular feature, unless the legislative apportionment is so arbitrary and devoid of any reasonable basis as to amount to an abuse of power.

Although no hearing may be afforded to owners of land within a taxing district on the appraisal of their lands for the purpose of apportioning the tax, if such a hearing is accorded when the tax is sought to be enforced, due process of law is not denied.

Revised Stat. Missouri 1909, c. 102, art. 7, and Missouri Laws 1911, 373, providing for establishment of road improvement districts and the issuing of bonds and levying of special taxes therefor, are not unconstitutional under the due process provision of the Fourteenth Amendment.

257 Missouri, 593, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings under the applicable statute of Missouri for issuing and selling road district bonds and levy of special taxes to pay them, are stated in the opinion.

Mr. Harris L. Moore, with whom *Mr. John M. Cleary* and *Mr. James F. Simrall, Mr. Ernest Simrall* and *Mr. W. A. Craven* were on the brief, for plaintiff in error:

Where the power to determine the boundaries of the benefit district, and what property shall be assessed to pay for an improvement, is delegated to a non-legislative body, due process of law demands notice and a hearing on

whether the property so marked out for taxation is, in fact, benefited. *Fallbrook District* v. *Bradley*, 164 U. S. 170; *Argyle* v. *Johnson*, 118 Pac. Rep. 487; *Spencer* v. *Merchant*, 125 U. S. 345; *Soliah* v. *Haskin*, 222 U. S. 522; *In re Kissel Ave.*, 143 N. Y. Supp. 467; *Bauman* v. *Ross*, 167 U. S. 548.

While it is true that ordinarily a benefit assessment that must be collected by suit cannot be said to be wanting in due process of law, yet if in such suit the property owner cannot have tried the question of whether his property is benefited, then such suit does not constitute due process of law as to that question, or supply the lack of a hearing thereon. *Londoner* v. *Denver*, 210 U. S. 373, 385; *In re Riverside Park*, 138 N. W. Rep. 426; *Argyle* v. *Johnson*, 39 Utah, 500; *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127; *Norwood* v. *Baker*, 172 U. S. 269.

The decision of the Supreme Court of Missouri, in so far as it construes the statute in question, is conclusive, and where it has held that the statute contains a legislative determination of the benefit district, then that is a conclusive decision that there is no hearing on that question, when suit is brought to collect. *Central of Georgia Ry.* v. *Wright*, 207 U. S. 127.

While the fact that a benefit assessment is to be collected by suit ordinarily constitutes due process of law, yet when a benefit assessment has become a final lien, divided into twenty installments, recorded in the public records as a lien on the land, and sold for cash, even if it is a fact that each property owner may defend each of the twenty suits required to be brought against each separate piece of property, being subject to heavy penalties and attorneys' fees in case of failure to make good the defense in whole or in part, there is neither such timely nor adequate hearing as is necessary to constitute due process of law. See cases *supra*.

Mr. William M. Williams and *Mr. Claude Hardwicke* for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to restrain the issue and sale of road district bonds and the levy and recordation of special taxes to pay them. A trial of the issues resulted in a judgment for the defendants, which at first was reversed and on a rehearing was affirmed. 257 Missouri, 593. The plaintiffs prosecute this writ of error.

When the suit was begun the road district had been organized, a road had been selected for improvement and preliminary steps had been taken for issuing the bonds and levying the special taxes—all conformably to the local statute. Rev. Stat. Mo. 1909, c. 102, art. 7; Mo. Laws 1911, 373. The district is about seven miles in length and three in width, and is bounded on the greater part of one side by the Missouri River. The road selected for improvement extends through the district in the direction of its length. The cost of the improvement is to be met temporarily by the issue and sale of bonds and ultimately by the levy and collection of special taxes upon all the lands in the district. The cost is to be apportioned by rating the lands—without the buildings thereon—at their full fair value where lying within one mile of the road, at seventy-five per cent. of such value where lying between one and two miles from the road and at fifty per cent. of such value where lying more than two miles therefrom (all seem to be within two miles here), and then charging each tract with a share of the entire cost corresponding to its proportion of the value of all the lands as so rated. The lands are appraised by the district commissioners and the cost of the improvement is apportioned by the county clerk.

The plaintiffs own lands within the district and object to the issue of the bonds and to the levy of the special taxes, upon the ground that the scheme for subjecting the lands to the payment of the cost is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the land owner is not afforded any opportunity to be heard on the questions whether his lands will be benefited by the improvement, whether, if benefited, the benefits in the different zones will be in accord with the graduated ratings before indicated, and whether the appraisement of his lands for the purposes of the apportionment is fair.

The district was not established or defined by the legislature but by an order of the county court made under a general law. Whether there was need for the district and, if so, what lands should be included and what excluded was committed to the judgment and discretion of that court subject to these qualifications: First, that the district should contain at least 640 acres of contiguous land and be wholly within the county; second, that the court's action should be invoked by a petition signed by the owners of a majority of the acres in the proposed district, and, third, that public notice—conceded to be adequate—should be given, by the clerk of the court, of the presentation of the petition and the date when it would be considered, and that owners of land within the proposed district should be accorded an opportunity to appear, either collectively or separately, and oppose its formation. In this connection the statute says: "The court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a prelim-

inary order establishing such public road district, and such order shall set out the boundaries of such district as established . . . but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance." The order actually made shows that four of the present plaintiffs, with three others, appeared in opposition to the petition, recites that "the court, after hearing and considering said petition and said protests and remonstrances and all evidence offered in support thereof, finds that the public good requires and makes necessary the organization, formation and creation of such proposed public road district . . . with boundaries as stated in said petition," and sets out the boundaries of the district as established.

The sole purpose in creating the district, as the statute shows, was to accomplish the improvement of public roads therein—the particular roads to be designated by the district commissioners and an approving vote of the land owners.

As the district was not established by the legislature but by an exercise of delegated authority, there was no legislative decision that its location, boundaries and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 167, 174–175.

Did the statute contemplate such a hearing? We have

seen that it required that adequate public notice be given of the presentation of the petition for the creation of the district and the time when it would be considered, made provision for the presentation of remonstrances by owners of lands within the proposed district, and directed that the petition and remonstrances be heard by the county court, that the court make such change in the boundaries "as the public good may require" and that the boundaries be not enlarged unless the owners of the lands not before included consent in writing or appear at the hearing and be given an opportunity to present objections. That a hearing of some kind was contemplated is obvious, and is conceded. But it is insisted that it was not to be directed to the question whether the lands included would be benefited by the creation of the district and what it was intended to accomplish. If that were so, there would be little purpose in the hearing and no real necessity for it.

True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries "as the public good may require." In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten.

Of course, the nature and extent of the hearing contemplated by the statute is a question of local law, and if it were clear that the Supreme Court of the State had settled it we should accept and follow that ruling. Whether

the question has been settled is at least uncertain. In the principal opinion delivered on the original hearing that court said: "We hold that the General Assembly in granting to land owners of a proposed road district the privilege of being heard by remonstrance intended that such land owners should have the right in such remonstrance to urge against the organization of the district or the inclusion of their lands therein any statutory or constitutional grounds which such land owners may possess; and that if such grounds be valid the court may exclude the lands of the remonstrants or refuse to incorporate the proposed district. This ruling is rendered necessary to avoid the conclusion that the General Assembly directed a hearing without intending that any relief might thereby be obtained." That opinion, although copied into the record, does not appear in the Missouri Reports. They contain only the opinion delivered on the rehearing. The former may have been entirely recalled. If so, the question dealt with in the quotation made from it has not been settled, for the later opinion is silent upon the subject. But whether the question be settled or open is not of much importance, for, as before indicated, our view of the statute accords with that expressed by the state court in the excerpt from the first opinion.

We conclude therefore that the statute did provide for according the land owners an opportunity to be heard, when the district was created, upon the question whether their lands would be benefited, and also that the order establishing the district shows that the statute was complied with in that regard.

But in opposition to this conclusion it is urged that an adequate hearing could not be had at that time because the road to be improved had not been selected and no one could say what lands would be benefited. We are not impressed with this contention. As was well under-

stood, the purpose in creating the district was to bring about the improvement of its roads. Their number, location and condition were known, as was also the extent and nature of their use. The district was of limited area and the proximity or relation of every part to each road was patent. As applied to such a situation, we perceive no serious obstacle to determining with approximate certainty and satisfaction whether the improvement of any one or more of the roads—even though no particular one was as yet selected—would be of benefit throughout the district. We say with approximate certainty and satisfaction, because this is all that is required. At best the question is one of opinion and degree, even where the improvement to be made has been definitely determined. The boundaries of drainage, irrigation and other benefit districts are often defined in this way. Indeed, it is conceded that had the legislature created this particular district the present objection would be untenable. If such a body can obtain the requisite information and exercise the requisite judgment, it is not easy to believe that the task would be more difficult for a county court sitting in the vicinity.

The claim that the land owners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously pressed upon our attention and requires but brief notice. The ratings are not fixed in the exercise of delegated authority but by the statute itself, which must be taken as a legislative decision that in a district lawfully constituted, in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and

an abuse of power (*Wagner* v. *Leser*, 239 U. S. 207; *Houck* v. *Little Drainage District*, 239 U. S. 254; *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55. And see *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445–446), which obviously is not the case here.

The claim that the land owners are not afforded an opportunity to be heard in respect of the value of their lands is also untenable. While no hearing is given when the lands are appraised one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the Supreme Court of the State holds, owners aggrieved by the valuation may have a full hearing upon that question. This is due process. *Davidson* v. *New Orleans*, 96 U. S. 97, 104; *Hagar* v. *Reclamation District*, 111 U. S. 701, 711.

Judgment affirmed.

HAMILTON-BROWN SHOE CO. *v.* WOLF BROTHERS & CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 37. Argued October 28, 29, 1915.—Decided February 21, 1916.

The words "The American Girl" as applied to women's shoes is not a geographical or descriptive term signifying that the articles are manufactured in America, or intended to be sold therein; nor does it indicate qualities or characteristics of the article.

In this case, *held* that the term "American Girl" is a fanciful designation, arbitrarily selected by a concern manufacturing shoes to desig-

nate their product, and as such it is subject to appropriation as a trade-mark for that purpose.

The record in this case shows that the term "American Girl" was legitimately appropriated and used as a trade-mark by the complainant and those under whom it claims.

The jurisdiction of this court to review judgments and decrees of the Circuit Courts of Appeals on certiorari under § 240, Jud. Code, is to be exercised sparingly and only in cases of peculiar gravity and general importance and in order to secure uniformity of decision, and the refusal of the application is in no case equivalent to affirmance.

The fact that the decree sought to be reviewed is not a final one furnishes sufficient ground for refusing the petition.

On certiorari, this court is called upon to notice and rectify any error that may have occurred in interlocutory proceedings, and is not bound to consider that an interlocutory decree settled the law of the case because it refused to review it on certiorari.

The right to use a trade-mark is property of which the owner is entitled to exclusive enjoyment to the extent that it has been actually used, and an infringer is required in equity to account for and yield up his gains to the true owner.

In this case, *held* that one using the label "American Lady" for shoes manufactured and sold by it infringed the rights of complainant as owner of the trade-mark "American Girl."

While the decree of the court below was based on profits gained by defendant in unfair competition by using an imitation of complainant's label and not for infringement of trade-mark, as the proofs and findings were as applicable to a claim of compensation for infringing a trade-mark to which complainant is found entitled, the decree may be affirmed.

Where defendant is not an innocent infringer and an apportionment between profits attributable to infringing the trade-mark and those attributable to intrinsic merit of his own article is inherently impossible, complainant is not limited in his recovery to the former; nor is the burden on him to show what such portion of the profits was.

The owner of the trade-mark is on every principle of reason and justice entitled to so much of the profit as resulted from its use, and it is more consonant with reason and justice that he should have all the profit than that he should be deprived of any portion thereof by the fraudulent act of the infringer.

On matters of fact in estimating the profits to which complainant is

entitled there is no sufficient reason for disturbing the decree based on rulings of the master in this case.
206 Fed. Rep. 611, affirmed.

THE facts, which involve rights of the owner of a trade-mark and the liability of one infringing it, and other questions, are stated in the opinion.

Mr. Luke E. Hart and *Mr. Joseph W. Bailey*, with whom *Mr. H. S. Priest* and *Mr. Morton Jourdan* were on the brief, for petitioner.

Mr. Lawrence Maxwell, with whom *Mr. Simeon M. Johnson* and *Mr. Percy Werner* were on the brief, for respondent.

MR. JUSTICE PITNEY delivered the opinion of the court.

Respondent, an Ohio corporation engaged in the manufacture of shoes, filed its bill of complaint on January 29, 1906, in the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division, against petitioner, a Missouri corporation engaged in the same business, seeking an injunction to restrain infringement of an alleged trade-mark for shoes consisting of the words "The American Girl," by the use of the words "American Lady" as a colorable imitation, and also unfair competition in trade, carried on by means that included the use of the latter words; and praying an accounting of damages and profits. On final hearing the Circuit Court dismissed the bill. Upon appeal, the Circuit Court of Appeals (165 Fed. Rep. 413) held that "The American Girl" was a geographical name, and, as applied to women's shoes, was descriptive merely of shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate the maker, and hence that the term

as applied to shoes was not the subject of a valid trade-mark. But the court held that complainant was entitled to be protected against unfair trade; that the record disclosed that it and its predecessors in business had employed the words "The American Girl" as a trade-mark continuously since the year 1896, had extensively advertised their shoes under that name, with the catch phrase "A shoe as good as its name," in trade journals and newspapers throughout the United States, and largely throughout the southern States, and thus established an extensive trade therefor; and that defendant by adopting in the year 1900 and thereafter using the name "The American Lady," with certain catch phrases, in connection with shoes made by it, and this with full knowledge of complainant's rights, was guilty of unfair competition, tending to and resulting in confusion in the trade, and that complainant was entitled to relief. The decree of the Circuit Court was therefore reversed, with directions to decree an injunction and an accounting limited to the time since the commencement of the suit.

Complainant petitioned this court for a writ of certiorari to review that decision, but this was denied. 214 U. S. 514.

Thereafter the Circuit Court, pursuant to the mandate of the Court of Appeals, made a decree granting an injunction in accordance with the opinion of that court, and referring to a master an accounting of the damages and profits for which defendant might be liable, "limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name 'American Lady,' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company." An accounting was had, extending from the date of the commencement of the suit to March 10, 1910. Complainant made no attempt to introduce substantial proof as to the amount of

its damages, declaring that they were practically incapable of exact computation. All the testimony was directed to the question of defendant's profits.

The master reported that during the period covered by the accounting defendant sold "American Lady" shoes, which, because of differences in marking, he divided into three classes:

Class 1. 974,016 pairs of shoes bearing the words "American Lady" stamped upon the sole, and bearing no other impression or distinguishing mark. The profits upon these were found to be $254,401.72.

Class 2. 961,607 pairs of shoes marked "American Lady," with the words "Hamilton-Brown Shoe Co." but without the word "Makers" or other matter indicating that the shoes were of defendant's manufacture. The profits upon these were found to be $190,909.83.

Class 3. 593,872 pairs of shoes marked "American Lady," but bearing also the marks "Hamilton-Brown Shoe Co., Makers." The profits upon these were found to be $132,740.77.

The master recommended that a judgment be entered for the profits accruing from the first two classes, aggregating $445,311.55. The profits accruing from the third class he held complainant was not entitled to recover under the opinion of the Court of Appeals and the decree of the Circuit Court entered in accordance with it. Both parties having filed exceptions, the District Court (successor of the Circuit Court), overruled those of complainant, sustained those of defendant, and adjudged a recovery of $1 nominal damages. 192 Fed. Rep. 930.

Complainant appealed to the Circuit Court of Appeals, contending that a decree should have been rendered in its favor for the profits upon the first two classes of shoes, in accordance with the master's recommendation, and that it should have included the profits upon the third class, which were denied by the master. The Court of Appeals

reversed the decree, with directions that defendant's exceptions to the master's report be overruled, that the report be confirmed, and that a decree be entered against defendant for the amount recommended by him, with costs. 206 Fed. Rep. 611.

This writ of certiorari having been allowed, we proceed to deal with the questions presented by the record.

Regarding the case as one of unfair competition without trade-mark infringement, it is insisted by petitioner that the normal recovery does not include the gains and profits of defendant, according to the rule admittedly applicable in equity to trade-mark cases, but that the injured party is limited to such damages as it shows it has sustained; and that the present case is devoid of circumstances to take it out of the ordinary rule.

If, however, complainant was and is entitled to the use of the words "The American Girl" as a trade-mark, in the strict sense of the term, and if the proofs adduced before the master, and his findings thereon, are as applicable to a claim of compensation for infringement of the trade-mark as to a claim of compensation for unfair competition in the absence of trade-mark, it will not be necessary to pass upon the question of the proper measure of recovery in a non-trade-mark case. As above pointed out, a claim of trade-mark right was asserted in the bill, and it has not been abandoned. It was overruled by the Circuit Court of Appeals on the first appeal, upon reasoning with which we are unable to concur. We do not regard the words "The American Girl," adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's

predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims.

The cases cited to the contrary are distinguishable. In *Canal Co.* v. *Clark*, 13 Wall. 311, 324, the word "Lackawanna" was rejected as a trade-mark for coal because it designated the district in which the coal was produced. In *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 466, it was held that "Columbia" could not be appropriated for exclusive use as a trade-mark because it was a geographical name. So, with respect to "Elgin," as designating watches, *Elgin Natl. Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 673; "Genesee," claimed as a trade-mark for salt, *Genesee Salt Co.* v. *Burnap*, 73 Fed. Rep. 818; "Old Country," as a mark for soap, *Allen Wrisley Co.* v. *Iowa Soap Co.*, 122 Fed. Rep. 796. If the mark here in controversy were "American Shoes," these cases would be quite in point. (And see *Shaver* v. *Heller & Merz Co*, 108 Fed. Rep. 821, 826.) But "The American Girl" would be as descriptive of almost any article of manufacture as of shoes; that is to say, not descriptive at all. The phrase is quite analogous to "American Express," held to be properly the subject of exclusive appropriation as a trade-mark for sealing wax in *Dennison Mfg. Co.* v. *Thomas Mfg. Co.*, 94 Fed. Rep. 651, 653.

It is contended that this question is settled otherwise, at least as between these parties, by the decision of the Circuit Court of Appeals on the first appeal and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the Court of Appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of

Appeals by certiorari under § 240, Jud. Code, derived from § 6 of the Evarts Act of March 3, 1891, 26 Stat. 826, 828, ch. 517. As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Amer. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296. And, except in extraordinary cases, the writ is not issued until final decree. *Amer. Const. Co.* v. *Jacksonville Railway*, 148 U. S. 372, 378, 384; *The Three Friends*, 166 U. S. 1, 49; *The Conqueror*, 166 U. S. 110, 113; *Denver* v. *N. Y. Trust Co.*, 229 U. S. 123, 133. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling "the law of the case" so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. *Panama Railroad*

v. *Napier Shipping Co.*, 166 U. S. 280, 284; *United States* v. *Denver & R. G. R. R.*, 191 U. S. 84, 93; *Lutcher & Moore* v. *Knight*, 217 U. S. 257, 267; *Messenger* v. *Anderson*, 225 U. S. 436, 444.

Having reached the conclusion that complainant is entitled to the use of the words "The American Girl" as a trade-mark, it results that it is entitled to the profits acquired by defendant from the manifestly infringing sales under the label "American Lady," at least to the extent that such profits are awarded in the decree under review. The right to use a trade-mark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has been actually used. *McLean* v. *Fleming*, 96 U. S. 245, 252; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 224. The infringer is required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the *cestui que trust*. Not that equity assumes jurisdiction upon the ground that a trust exists. As pointed out in *Root* v. *Railway*, 105 U. S. 189, 214, and *Tilghman* v. *Proctor*, 125 U. S. 136, 148 (patent cases), the jurisdiction must be rested upon some other equitable ground—in ordinary cases, as in the present, the right to an injunction—but the court of equity, having acquired jurisdiction upon such a ground, retains it for the purpose of administering complete relief, rather than send the injured party to a court of law for his damages. And profits are then allowed as an equitable measure of compensation, on the theory of a trust *ex maleficio*. In the courts of England, the rule seems to be that a party aggrieved must elect between damages and profits, and cannot have both. In this country, it is generally held that in a proper case both damages and profits may be awarded. As already observed, the decree under review allows profits only, confines the allowance to such as ac-

crued after the commencement of the suit, and excludes all sales where the term "American Lady" was accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company. It was construed to exclude all shoes bearing in addition to "American Lady" the marks "Hamilton-Brown Shoe Co., Makers." The account was based upon undisputed data, and no reason is suggested why, if otherwise accurate, it is not as properly applicable upon the theory of trade-mark as upon that of unfair competition aside from trade-mark infringement—at least, so far as defendant is entitled to criticise it; complainant is not attacking the decree.

It is, however, insisted by defendant (petitioner) that whether the recovery be based upon the theory of trade-mark, or upon that of unfair competition, the profits recoverable should be limited to such amount as may be shown by direct and positive evidence to be the increment to defendant's income by reason of the infringement, and that the burden of proof is upon complainant to show what part of defendant's profits were attributable to the use of the infringing mark. It is said the true rule is strictly analogous to that applied in patent cases, and *Mowry* v. *Whitney*, 14 Wall. 620, 650; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139; *Garretson* v. *Clark*, 111 U. S. 120, 121; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, 444; *Tilghman* v. *Proctor*, 125 U. S. 136, 146; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 147; *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 615; and *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, are relied upon. The rule invoked is that which, as pointed out in the last two of these cases, is applicable where plaintiff's patent relates to a part only of a machine or combination or process, or to particular improvements in a machine or other device. In such case, where the invention is used in combination with other elements of value not covered by the patent,

so that plaintiff's patent creates only a part of the profits, he is entitled to recover only that part, and must give evidence tending to apportion the profits between the patented and unpatented features. But, as pointed out in the *Westinghouse Case* (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, "on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong."

Assuming the asserted analogy to patent cases to exist, a sufficient reason for not requiring complainant in the present case to make an apportionment between the profits attributable to defendant's use of the offending mark and those attributable to the intrinsic merit of defendant's shoes is that such an apportionment is inherently impossible. Certainly, no formula is suggested by which it could be accomplished. The result of acceding to defendant's contention, therefore, would be to deny all compensation to complainant. And it is to be remembered that defendant does not stand as an innocent infringer. Not only do the findings of the Court of Appeals, supported by abundant evidence, show that the imitation of complainant's mark was fraudulent, but the profits included in the decree are confined to such as accrued to defendant through its persistence in the unlawful simulation in the face of the very plain notice of complainant's rights that is contained in its bill. As was said by the Supreme Court of California in a similar case, *Graham* v. *Plate*, 40 California, 593, 598; 6 Am. Rep. 639, 640: "In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of

the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the use of the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong." To the same effect are *Avery* v. *Meikle*, 85 Kentucky, 435, 448; 7 Am. St. Rep. 604, 610; *El Modello Cigar Co.* v. *Gato*, 25 Florida, 886, 915; 23 Am. St. Rep. 537, 544; 6 L. R. A. 823, 829; *Regis* v. *Jaynes*, 191 Massachusetts, 245, 249, 251; *Shoe Co.* v. *Shoe Co.*, 100 Maine, 461, 479; *Saxlehner* v. *Eisner & Mendelson Co.*, 138 Fed. Rep. 22, 24.

Finally, it is contended that the account as stated by the master and confirmed by the Circuit Court of Appeals failed to make due allowance for certain items entering into the cost of manufacturing and selling the shoes in diminution of defendant's profits, including interest on capital, depreciation of real estate, taxes, insurance, advertising, and trade discounts. These are matters of fact, respecting which we see no sufficient reason for disturbing the decree. One of the points

most earnestly insisted upon is that certain overhead charges, appearing on defendant's books as "Advance Boston House, $73,772.03" and "Allowance to Boston, $103,075.14," of which the amount chargeable *pro rata* against "American Lady" shoes not marked "Makers," for the period covered by the accounting, was $10,271.69, ought to have deen deducted in computing defendant's profits. The only explanation of these charges is in a stipulation of the parties that they "represent allowances made by the wholesale house of Hamilton-Brown Shoe Company on goods shipped by it to what is known as the 'Boston House,' being a separate and distinct corporation from the defendant company, and the amount received by the Hamilton-Brown Shoe Company from the 'Boston House' for goods shipped to it was $73,772.03 and $103,075.14 less than the price at which the goods were billed to that house, and those items do not represent moneys paid by the Hamilton-Brown Shoe Company to the 'Boston House' or advances by the Hamilton-Brown Shoe Company to the 'Boston House.'" If, in the Master's calculation of the profits, defendant had been charged with sales of the goods at the prices at which they were billed to the Boston House, the insistence that a deduction of $10,271.69 ought to be allowed as being in the nature of a trade discount would seem correct. But that is not made to appear, and we cannot conclude that the Master erred in overruling this allowance.

Decree affirmed.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER are of opinion that the term "The American Girl," as applied to women's shoes made and sold in America, is geographical and descriptive and not subject to exclusive appropriation as a trade-mark, and that upon this record a recovery of the entire profits is not admissible. They therefore dissent.

GUERINI STONE CO. *v.* P. J. CARLIN CONSTRUCTION CO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 78. Argued November 12, 1915.—Decided February 21, 1916.

In the case of sub-contracts, as in other cases of written agreements, a reference to an extraneous writing for a particular purpose makes it a part of the agreement for that purpose only.

In this case, *held* that the general contract between the Government and the contractor was not admissible as against a sub-contractor except for the specific purpose mentioned in the subcontract, to wit; showing what drawings and specifications were referred to therein, nor was the sub-contractor bound by provisions in the general contract so as to be obliged to submit to delays resulting from the action of the Government permitted by the original contract.

Where a contractor agrees with a sub-contractor to provide labor and materials not included in the sub-contract he assumes an obligation not conditioned on the question of his fault; and whether the delay in supplying such labor and materials be attributable to him or to the exercise by the owner of a right reserved by the principal contract, he remains liable under the sub-contract.

In this case *held* that although the principal contract between the Government and the contractor gave the Government the right to suspend, as the contractor had not safeguarded himself by incorporating that provision into the sub-contract, he was not relieved from the damages caused the sub-contractor by such suspension.

In estimating profits that might be realized if a building contract had been proceeded with in the ordinary manner to completion, no more definite and certain method can be adopted than to deduct from the contract price the probable cost of furnishing the materials and doing the work.

A provision in a sub-contract requiring the contractor to make monthly payments not exceeding 85% of cost of work erected cannot be construed to require precisely that percentage; nor can a provision that the sub-contractor furnish requisitions of the amount to be paid make the sub-contractor sole judge of the amount it is en-

titled to receive. Such provisions must receive reasonable construction.

Where the form of a request to instruct is such that compliance with it might mislead the jury, there is no error in refusing it.

THE facts, which involve the rights and liabilities of a sub-contractor on government work, are stated in the opinion.

Mr. Edward S. Paine for plaintiff in error.

Mr. Francis H. Dexter for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here under review a judgment for damages in favor of plaintiff in error (also plaintiff below) against defendant in error (also defendant below), reversal being asked upon the ground that, through erroneous rulings made by the trial judge, the recovery was unduly limited. The writ of error was sued out under § 244, Jud. Code (act of March 3, 1911, c. 231; 36 Stat. 1087, 1157), prior to the act of January 28, 1915 (38 Stat. 804, c. 22, §§ 3 and 6).

Defendant, a corporation of the State of New York, on December 12, 1910, secured a contract with the Government of the United States for the construction of a post-office and court building at San Juan, Porto Rico. A few days later it entered into a sub-contract in writing with one Guerini, by the first paragraph of which he agreed: "To furnish and set in position, including the concrete backing, all the imitation of sandstone, and to construct the interior concrete walls, concrete floors, concrete roof, backing the granite construction, enclosing all the I beams . . . agreeable to the drawings and specifications made by the said architect (copies of which have been delivered to the Sub-Contractor), and to the dimensions and explanations thereon, therein and herein

contained, according to the true intent and meaning of said drawings and specifications," etc.; it being agreed that the work should be done "under the direction and to the satisfaction of the General Contractors and James Knox Taylor, Architect (acting as Agents of the Owner) or his, or its representative."

A subsequent paragraph reads as follows:

"25th. The Sub-Contractor further agrees to furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

"Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square yard.

"Also set in position all the granite walls, steps, balusters, buttresses and curbing, and all other granite work for the sum of 40 cents a square foot surface. The three above items to be at the option of the general contractor. . . ."

Thereafter the plaintiff corporation was formed under the laws of Massachusetts, and Guerini transferred the contract to it. Defendant was notified of this, expressed satisfaction in writing under date February 20, 1911, and thereafter dealt with plaintiff as sub-contractor.

At a later time, defendant exercised the third only of the options given to it by the twenty-fifth paragraph.

The plan of the building contemplated a foundation of concrete and piles, which was to be constructed by defendant complete to the basement floor; above this a basement story, surfaced with granite blocks to be furnished by defendant (as a practical matter, to be sent from the United States) and to be set in position by plaintiff under the accepted option. The blocks were to be backed with concrete, to be furnished and set by plaintiff. Above the basement story, the exterior walls were to be faced with imitation sandstone, backed with concrete, which together with interior walls, floors, and roof of concrete were to be constructed by plaintiff.

The contract contained the following clauses that bear upon the matters in dispute:

"6th. The Sub-Contractor shall and will proceed with the said work and every part and detail thereof in a prompt and diligent manner, . . . and shall and will wholly finish the said work according to the said drawings and specifications and this contract in 300 days from the date upon which the building is ready to receive his work and after he has been notified to proceed by General Contractors, and in default thereof, the Sub-Contractor shall pay the General Contractors the sum of twenty dollars for every day thereafter that the said work shall remain unfinished as and for liquidated damages. The Sub-Contractor further agrees to begin work at the building within three days from the time that he is notified by the General Contractors that the building is ready to receive such work.

"7th. . . . Should the Sub-Contractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay or default of the Owner, the Architect, the General Contractors, or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damages which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the Sub-Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid," etc.

"11th. The General Contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Sub-Contractor, agree that they will reimburse the Sub-Contractor for such loss; and the Sub-Contractor agrees that if he shall delay the material progress of the work so

as to cause any damage for which the General Contractors shall become liable, then he shall make good to the General Contractors any such damage over and above any damage for general delay, herein otherwise provided; the amount of such loss or damage in either case, to be fixed and determined by the Architect, or by arbitration, as provided in Article 3rd in this contract.

"12th. It is hereby mutually agreed by the parties hereto that the sum to be paid by the General Contractors to the Sub-Contractor for said work and materials shall be sixty-four thousand seven hundred and fifty dollars ($64,750.00) subject to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds by the General Contractors to the Sub-Contractor in monthly payments on account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required, . . . "

The action was commenced in June, 1912. The complaint, besides the jurisdictional averments, alleged the making of the contract between Guerini and defendant, the assignment to plaintiff and defendant's consent and recognition of plaintiff as the contracting party; averred that thereafter and during the month of February, 1911, at defendant's request and in pursuance of the terms of the contract, plaintiff employed and sent to Porto Rico its representatives, brought laborers from the United States and employed others in Porto Rico, organized its working forces, purchased and supplied the necessary tools and materials, and prepared itself and was ready and willing to perform its obligations under the contract, but that thereafter until the sixteenth day of October, 1911, plaintiff was not permitted by defendant to proceed with the work, owing to defendant's failure to provide the neces-

sary granite blocks; that on that day plaintiff did proceed with all possible diligence and performed all the work provided for by the contract as fast as defendant in the course of construction work permitted plaintiff to do so; that nevertheless during the period from October 16, 1911, until March 9, 1912, the work was unreasonably and unjustifiably delayed by the failure of defendant to provide necessary materials and carry on its part of the construction work so as to permit plaintiff to perform the work required of it under the contract, and that plaintiff was thereby greatly damaged; that on March 9, 1912, all work of every nature was stopped on the building, and plaintiff was prevented by defendant from continuing with any work; that said stoppage "has continued ever since, is still continuing, and . . . will continue for a period of at least several months hereafter," and that defendant has accordingly committed a breach of its obligations under the contract, the result of which has been and is to cause great damage and loss to plaintiff, which has been obliged to keep its labor force on hand during all of said period at great loss and expense; that by the terms of the contract payment of not more than 85% of the amount of the work actually done was due and payable by defendant monthly on 12 days' notice from plaintiff to defendant, and that plaintiff during the months of December, 1911, and January and February, 1912, duly notified and demanded of defendant payment of the sums due for the work actually performed, but that defendant continuously and repeatedly failed and refused to make said payments; that because of said repeated violation and breach of the contract on the part of defendant, plaintiff, under date of May 22, 1912, notified defendant in writing of its election to terminate the contract and bring its action for damages for breach thereof; and that plaintiff has offered to defendant to arbitrate their differences, but that defendant has refused. Plaintiff claimed damages to the amount of

$45,797.45 for work and labor performed, materials furnished, and moneys expended in and about the performance of the contract, and for lost profits. In a separate paragraph an indebtedness of about $40,000 was alleged, for the reasonable value of work, labor, and materials supplied.

Defendant answered, admitting some of the averments of the complaint, but denying that plaintiff had complied with the terms of the contract or had been prevented by defendant from proceeding with and carrying on its work; admitting that plaintiff notified defendant of its election to cancel or rescind the contract and bring its action for damages for the alleged breach thereof, but denying that there was cause for rescission, and denying that plaintiff had sustained damages as claimed by it. The answer further set up that the sub-contract was subject to all the terms and conditions of the principal contract made between defendant and the Government of the United States; that defendant had at all times proceeded strictly in accordance with the terms and conditions of the latter contract, that during the course of the construction of the building the representatives of the Government found it desirable or necessary to change the manner of constructing the foundations, and that this action of the Government was within its rights under the original contract, and plaintiff was bound thereby equally with defendant.

The case was tried before the judge of the District Court and a jury. Plaintiff introduced evidence tending to support the material averments of its complaint. It appeared that in January, 1911, defendant notified plaintiff's predecessor that "work must start at once," and that in February plaintiff sent its representatives to Porto Rico; that upon their arrival so little work had been done upon the foundations that they were unable to do anything upon the building itself, but preliminary work was done in the way of getting tools and machinery to the Island, building

workshops and an office, and preparing moulds for the casting of the artificial stone; that during the spring and summer delay was occasioned by the failure of defendant to construct the foundations; that this continued until about the first week in October, when the foundation work and the grading inside the foundation walls had proceeded to a point that would admit of the commencement of the course of granite, and enough granite was upon the ground to allow a start to be made of setting it. In August or September plaintiff was notified of defendant's acceptance of the option to call upon plaintiff to set the granite at 40 cents per square foot, but the granite was slow in arriving, and some of the stones were misfits, so that the work of laying was considerably interrupted. There was difficulty also with the derrick equipment, defendant having under the contract furnished two derricks and an engine, but with insufficient power to admit of operating both derricks at the same time. This was remedied, some time in December, by the provision of additional power. The granite setting proceeded from the middle of October to February 12, 1912, plaintiff's evidence being to the effect that it was set as fast as delivered, but that because the granite came in separate shipments, a little at a time, sometimes with needed blocks missing, the work of setting it could not be speeded. On or about February 12, 1912, plaintiff stopped setting granite, with defendant's consent.

The evidence tended to show that much of the delay during the spring and summer of 1911 was occasioned by a change made by arrangement between defendant and the Government in the provisions of the general contract respecting the mode of constructing the foundations. The pleader would seem to have limited the complaint respecting delay prior to October 16, 1911, to such as was due to defendant's failure to provide granite blocks, but the evidence was not thus limited.

In February, 1912, when the granite work had been

practically finished, it was ascertained that the foundations had settled, and that there were variations in the foundation work from the specifications as agreed upon between the Government and defendant. On March 9 work was suspended by order of the Government, pending an investigation which resulted in showing that practically the entire building would have to be underpinned in order to secure a safe foundation. This result was officially communicated to defendant under date March 25, 1912, and a few days later, pursuant to an order of the Assistant Secretary of the Treasury, all work upon the building was stopped "pending the settlement of responsibility for deviations from contract requirements regarding foundations." The question of responsibility lay between defendant and the representatives of the Government; plaintiff having had nothing to do with the foundations. Leaving the question undetermined, the Government, in the month of May, 1912, entered into an agreement with defendant for underpinning the entire building. It perhaps does not clearly appear when this work was commenced, but it was in progress when the action was begun, and Mr. Berryman, the Government's superintendent of construction then in charge of the building, testified: "This work is now [November, 1912] about 85 per cent. completed." The same witness testified that from March 9, 1912, until the time of the trial, "conditions were such that it was impossible for the Guerini Stone Company to continue with their work under the contract."

On March 9, 1912, plaintiff's agent at San Juan was notified by defendant's representative there that the Federal authorities had ordered all work upon the building suspended pending investigation of the foundations. On the same day he wrote defendant's San Juan office asking whether plaintiff's men should be discharged and sent back to the United States, but got no satisfactory reply. Further correspondence upon the same topic led to no result.

Meanwhile, the parties had been in disagreement about payments on account. The contract (paragraph 12) provided for payment of the contract price "in monthly payments on account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the Sub-Contractor furnishes to the General Contractors a written requisition, on a form to be supplied by the General Contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how the cost of the work other than the granite setting should be ascertained. For the concrete backing and other concrete work and the imitation sand-stone covered by the sub-contract, no "unit prices" were specified. The price of "6.70 a cubic foot," mentioned in the twenty-fifth paragraph as the optional price for concrete footings, was treated by the parties as if intended to read $6.70 per cubic *yard*—approximately 25 cents per cubic foot. This, however, had reference to work that plaintiff was not called upon to do, and obviously did not furnish a unit price for the concreting actually done by plaintiff.

In December, 1911, and January, 1912, plaintiff made written requisitions for payments on account, based upon statements of the "amount of work completed to date." They were not complied with, and the parties soon realized the practical importance of agreeing upon a unit price to be employed in estimating the amounts payable. According to the testimony of Mr. Converse, President and Treasurer of the Guerini Company, he went from Boston to New York City on February 2, 1912, by appointment, and conferred with Mr. Carlin, defendant's representative, upon the subject of unit prices, and it was then agreed that plaintiff should make its applications and receive its payments upon the basis of a certain written schedule of units, produced by Mr. Carlin, which specified (*inter alia*): "Exterior and interior concrete walls, arches and cement

work, $1.07 per cu. ft.; Concrete floors and casings, 45½c per sq. ft." Mr. Carlin, in his testimony, denied that such an agreement was made, but admitted that the schedule had been agreed upon between defendant and the Government's superintendent of construction and used as a basis for payments by the Government to defendant, including payments for the work done by plaintiff under the sub-contract. At the interview of February 2, Mr. Converse received a check for $3,765.50 on account, as against $12,750.00 previously called for. Under date of March 9th a requisition for $11,735.95 was made, and against this a payment of $674.00 was made about two weeks thereafter. No other payments were made to plaintiff. It appeared, however, that for the work theretofore done by plaintiff, defendant had received from the Government at least $13,871.25 (a witness called by defendant said "about $19,000"), based upon the price of $1.07 per cubic foot for concrete. It was explained that this unit price was fixed by the first superintendent of construction, who had charge during the year 1911 and the first month of the following year, and that his successor, who took charge on February 1, 1912, employed a lower unit price, on the basis of which the Carlin Co. had been overpaid about $8,000.

Enough has been said to indicate the situation as it stood on May 22, 1912, on which date plaintiff wrote to defendant reciting briefly its complaints respecting defendant's previous conduct and the stoppage of the work and concluding as follows:

"Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with

us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

Defendant acknowledged receipt and replied May 31, 1912: "Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price."

Plaintiff further produced evidence tending to show that the moneys expended by it in and about the performance of the contract amounted to upwards of $30,000; that if permitted to complete the contract under ordinary conditions, its estimated profits would have been about $9,700; and that defendant had taken over machinery, tools, etc., belonging to plaintiff estimated to be worth from $3,300 to $3,800.

Defendant to some extent disputed the facts recounted in and inferable from plaintiff's evidence, but based its defense principally upon the provisions of the contract between defendant and the Government, which it was insisted must be read into the contract between plaintiff and defendant. Among those provisions was this:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the Supervising Architect it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the

Supervising Architect; and a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

And among the "General Conditions" prefacing the specifications was this:

"The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on said work."

Other contentions were made which are not now material.

The jury rendered a verdict somewhat special in form, finding for the plaintiff and assessing its damages at $6,609.25, "including the value of tools inventoried at $3,000." The judge had instructed them that for certain material and appliances used by plaintiff in carrying out its contract, and which were placed in the custody and charge of defendant, "credit must be given, in whatever decision you arrive at, to the plaintiff company, and in the uncontradicted sum of $3,000." Just how the residue of the verdict was made up we have no means of determining, nor is it now important.

The chief controversy here is over the admission in evidence of the general contract, and the effect given to it in the rulings of the trial judge, which were in substance that the provisions of that contract, including those above quoted, were to be read into the sub-contract, and that for any delays which resulted from the action of the representatives of the Government in changing the foundations or plans of the building, in suspending or stopping the work, or otherwise, defendant was not

responsible to plaintiff. To these rulings exceptions were duly taken.

From what was said by the trial judge it would seem that he labored under the impression that the Supervising Architect of the Treasury was a party to the sub-contract. This is not the case; he did not sign the agreement, and his name was inserted solely in the capacity of architect or referee. And although the sub-contract very plainly imports that it covers only a part of the work of constructing the building, and that the Carlin Company was the general contractor, it contains no clause incorporating into itself the provisions of the principal contract, or even in terms referring to that instrument. The sub-contractor's work was agreed to be done according to drawings and specifications, "copies of which have been delivered to the subcontractor." These copies were not produced, nor was their non-production accounted for. The parties seem to have assumed that the drawings and specifications of which copies were to have been delivered with the sub-contract were identical with those that formed a part of the general contract; and we adopt that assumption.

The reference in the sub-contract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the sub-contractor. Notwithstanding occasional expressions of a different view (see *Shaw* v. *First Baptist Church*, 44 Minnesota, 22, 24; *Avery* v. *Supervisors*, 71 Michigan, 538, 546, 547; *Stein* v. *McCarthy*, 120 Wisconsin, 288, 295), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of sub-contracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. *Woodruff* v. *Hough*, 91 U. S.

596, 602; *Neuval* v. *Cowell*, 36 California, 648, 650; *Mannix* v. *Tryon*, 152 California, 31, 39; *Moreing* v. *Weber*, 3 Cal. App. 14, 20; *Short* v. *Van Dyke*, 50 Minnesota, 286, 289; *Noyes* v. *Butler Bros.*, 98 Minnesota, 448, 450; *Modern Steel Co.* v. *English Construction Co.*, 129 Wisconsin, 31, 40, 41.

In the present case, not only was the reference to the drawings and specifications for a limited purpose, but the sub-contract, by the express terms of its eleventh paragraph, placed upon the general contractor (defendant) the obligation to "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." Applying this to the facts of the case, defendant agreed to furnish the foundation in such manner that plaintiff might build upon it without delay. This is inconsistent with any implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless.

We therefore hold that the general contract was not admissible in evidence against plaintiff, unless for the purpose of showing (if, indeed, it did show) what drawings and specifications were referred to in the sub-contract; and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the Government, were erroneous.

Another point that may conveniently be dealt with here is raised by an exception taken to the instruction that "even if there was delay in furnishing granite, there could have been no liability under the sub-contract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided." This was clearly erroneous. Paragraph 11 binds defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide materials not included in the sub-contract. The

granite was in this category. The trial court misapplied Paragraph 7. The extension of time therein provided for was intended as a dispensation, under given circumstances, of the liability to liquidated damages imposed upon the sub-contractor by Paragraph 6 for failure to complete his work within the time therein limited. The purpose of Paragraph 7 is to relieve the sub-contractor. It cannot properly be construed to deprive him of his right under Paragraph 11 to reimbursement for losses attributable to delays assumed by the general contractor. *Nelson* v. *Pickwick Associated Co.*, 30 Ill. App. 333.

What has been said indicates the disposition that must be made of another exception taken by plaintiff, which was to the instruction that under Paragraph 7 plaintiff was not entitled to recover damages or money compensation from defendant even though it should appear that plaintiff "was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the Government of the United States, the Supervising Architect, or his representatives, or by defendant, or by alterations required in the work, since by the provisions of that paragraph the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the sub-contract, in such manner as to delay the material progress of the work."

As we have shown, the failure to furnish a foundation upon which plaintiff's work could be superimposed was a failure to provide "labor and materials not included in this contract," within the meaning of paragraph 11. To furnish the foundation defendant assumed an obligation not conditioned by the question whether it was at fault or whether the delay was involuntary on its part because attributable to a stoppage of work by the owner in the exercise of a right conferred upon it by the principal con-

tract. Defendant of course had notice of the Government's right to suspend the work, and could easily have safeguarded itself against responsibility to the sub-contractor for delays attributable to the exercise of that right by an appropriate modification of Paragraph 11 of the sub-contract, for which presumably an allowance would have been made to the sub-contractor in the form of an increased price for its work or otherwise. This not having been done, Paragraph 11 must be enforced as it is written. It matters not whether plaintiff or its predecessor had notice of the provision of the general contract respecting suspension of the work, since that provision was not incorporated into the sub-contract. It must be presumed that delays attributable to action by the Government were among those intended to be safeguarded by Paragraph 11.

There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the sub-contract. This amounted to $53,012. The contract price was $64,750. The witness testified that a profit of $9,700 would have been made. Whether he intended to say $11,700 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work. *Phila., Wil. & Balt. R. R.* v. *Howard*, 13 How. 307, 344; *Hinckley* v. *Pittsburgh Steel Co.*, 121 U. S. 264, 275; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549.

Error is assigned to the refusal of the trial judge to give the following instruction:

"If you find that the defendant failed to make payments as called for by the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of the contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of such damages as may be proper on the evidence and under the instructions which the Court will give you in that regard."

The request was evidently based upon the doctrine illustrated in *Canal Co.* v. *Gordon*, 6 Wall. 561; *Phillips &c. Constr. Co.* v. *Seymour*, 91 U. S. 646, 649; *Norrington* v. *Wright*, 115 U. S. 188, 205. There is a difficulty, however, in applying that doctrine to this case, due to the fact that the contract does not either specify the amount of the advance payments or indicate how they are to be ascertained. The language of Paragraph 12 is that the contract price is to be paid "in monthly payments on account not to exceed in amount 85% of the cost of the work actually erected in the building, provided," etc. There is no clause, such as is frequently found in contracts of this character, that the amounts payable from time to time shall be ascertained and certified by the architect. The language cannot be construed to oblige the general contractor to pay precisely 85% of the cost of the work done; the use of the words "not to exceed" forbids this. The paragraph must receive a reasonable construction, and undoubtedly required the general contractor to make substantial payments monthly, fairly approximating but not exceeding 85% of the cost of the work. But the proviso requiring the sub-contractor to furnish to the general contractor a written requisition did not entitle the sub-contractor to be the sole judge of the amount it was entitled to receive. On the contrary, the provision that the requisition should be submitted "not less than twelve days before payment is required" evidently con-

templated that the general contractor was to be afforded an opportunity to verify the propriety of the demand made. But the evidence fails to show that the requisitions were based upon the cost of the work, or that any clear statement of such cost was submitted with them. As already pointed out, the parties endeavored to arrive at an agreement about unit prices, in order that these might be employed in making up the requisitions. Whether they did so agree the evidence left in dispute. If the agreement was made, it was at the interview of February 2, 1912. A letter is in evidence, written by plaintiff to defendant under date of February 6, saying: "In accordance with your instruction to Mr. Converse we have made our January requisition in the units and unit prices used by the Government engineer. . . . We inclose formal requisition for $9,012.50 due us under contract." But the requisition itself was not introduced. The next and last requisition appears to have been made under date March 9, 1912, and this stated "Amount of work completed to date, $18,237." But such details as were furnished do not seem to bear out this estimate. In the state of the record, we cannot say that there was error in the refusal of the requested instruction.

Error is assigned because of the refusal to instruct the jury as follows:

"In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."

Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was

rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. *United States* v. *Behan*, 110 U. S. 338; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551, 552; *Roehm* v. *Horst*, 178 U. S. 1, 21. But, as already pointed out, other grounds of action were declared upon: (a) defendant's failure to provide granite blocks prior to October 16, 1911; (b) its failure between that date and March 19, 1912, to provide necessary materials and carry on its part of the construction work; and (c) a *quantum meruit* for labor performed and materials furnished. In the event of plaintiff's recovery being based upon these grounds only, some of the elements indicated in the request would not be properly applicable. The form of the request was such that compliance with it might have misled the jury, and hence there was no error in refusing it.

Exceptions were taken to the refusal of certain other instructions requested by plaintiff with the object of basing a recovery of damages, including profits, upon the ground of plaintiff having been prevented by defendant's acts from performing its contract within the time specified or a reasonable extension thereof, or on the ground that defendant's refusal to make payments and other breaches of contract were so unreasonable and inexcusable as to indicate an inability or unwillingness on its part to carry out the contract or to amount to a refusal to perform it in the future, such as to justify plaintiff in stopping work. But these exceptions have not been fully argued, and the requests are perhaps wanting in accuracy; hence, we pass them without consideration.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNION NAVAL STORES COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 80. Submitted December 20, 1915.—Decided February 21, 1916.

A claim of the United States for spirits of turpentine and rosin taken from government lands is not fatally defective because the crude and not the manufactured property was taken from the land, or because the land was described by the general description by which it was known, there being no other lands so known.

There being evidence from which the jury could form a reasonably certain estimate of amount of crude product taken by a trespasser from government land and the probable amount of manufactured product it would produce, *held* that defendant was not entitled to a peremptory instruction in his favor, or one to limit recovery to nominal damages, because the precise quantity was not shown.

Land entered by a homesteader remains public land of the United States for five years and until patent is issued, subject to the right of the homesteader to treat the land as his own, so far, and only so far, as is necessary to carry out the purposes of the act; and such purposes do not include boxing and chipping trees for the purpose of extracting turpentine or rosin for sale and profit.

Such boxing and chipping is not cultivation; and, as government publications have pointed out, seriously affects the value of the trees.

The Act of June 4, 1906, c. 2571, 34 Stat. 208 (Crim. Code, § 51), prohibiting the boxing of trees on government land for turpentine, rendered criminal that which prior to the passage of the act was actionable; and one conducting, with full knowledge of the facts, in 1904 and 1905, turpentine operations on government land under an unperfected homestead entry was a willful trespasser, and ignorance of the law does not excuse him.

Where, as in this case, the trespass was willful, the United States is not divested of its property, but is entitled to the product manufactured by a third person who knowingly purchased the same from the trespasser.

One knowingly taking property of another cannot, by changing its form or increasing its value, or commingling it with other property of his own, acquire title by accession.

The fact that the purchaser had a mortgage on the product, both crude and manufactured, of the trespasser, which contained an after-acquired property clause and covered a large amount of other property *held* not to affect the right of the United States to recover that part of the manufactured product which the jury found was derived from the crude article taken from government land.

One knowingly purchasing a manufactured article from a trespasser who converted the crude article, must account for the value as manufactured and can take no credit for the work and labor of the wrongdoer in manufacturing it.

202 Fed. Rep. 491, affirmed.

THE facts, which involve the liability of one who improperly converted turpentine and rosin from Government lands, are stated in the opinion.

Mr. Richard W. Stoutz for plaintiff in error.

Mr. Assistant Attorney General Knaebel for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action by the United States against the Union Naval Stores Company for the conversion during the years 1904 and 1905 of spirits of turpentine and rosin alleged to have been taken by defendant from certain Government lands in the County of Mobile, in the State of Alabama, known as the Freeland Homestead, and thus and otherwise more particularly described in the complaint.

The facts, as they appeared at the trial, were as follows: Freeland had made an application for a homestead entry under § 2289, Rev. Stat., but never perfected it. Being the owner of other lands in the same neighborhood, Freeland agreed with one Rayford to give him a turpentine lease for a lump sum upon all of his timber, not including the homestead. A third party having been employed to reduce the agreement to writing, Freeland discovered that the homestead had been included, and he called Rayford's attention to this and tendered back the

check given for the consideration money, on the ground that if the homestead was included in the lease he would be in danger of losing his entry. Rayford replied: "There is no law against turpentining a piece of homestead land as long as you are on it." And so Freeland made no further objection.

Rayford, during the years in question, conducted turpentining operations upon the Freeland homestead and a large number of other tracts in its vicinity. Under date December 21, 1903, he had entered into a "shipping contract" with the Union Naval Stores Company, by which he undertook to cut and box at least 10 crops of 10,500 boxes each from lands described in a deed of trust or mortgage of even date given by him to one Wade as trustee of the company, and to manufacture the crude turpentine into spirits of turpentine and rosin, and deliver the manufactured product at Mobile, Alabama, or other points selected by it. By the same agreement plaintiff in error undertook to advance moneys to be used by Rayford, and that it would receive the manufactured turpentine and rosin and sell it for Rayford's account at stipulated charges and commissions. The mortgage was given to secure the advances and the performance of the shipping agreement. It covered Rayford's turpentine leases, and also all crude and manufactured spirits of turpentine, and other products owned or in any manner secured by Rayford during the continuance of the contract. The crude turpentine taken by Rayford from the homestead was mixed with that taken from his other properties at or before it reached the still; and the manufactured products were shipped from time to time to plaintiff in error at Mobile, bills of lading being sent by mail, and accounts of sales being returned by plaintiff in error to Rayford.

It was admitted that, during the years 1904 and 1905, spirits of turpentine and rosin were received by plaintiff in error from Rayford, under the contract and mortgage re-

ferred to, in quantities greater than those claimed for in the suit. There was evidence as to the market values of these products during the period in question, but none as to the market value of crude turpentine. A verdict and judgment having gone in favor of the United States for $2,447.55, defendant appealed to the Circuit Court of Appeals, where it was directed that so much of this as represented interest prior to the commencement of the action should be remitted, and the judgment otherwise affirmed. 202 Fed. Rep. 491.

There are numerous assignments of error, based upon exceptions taken at the trial, one of them to the refusal to direct a verdict in favor of defendant, the others to instructions given or refused to be given. Without reciting these in detail, we will express our views upon the principal questions of law that are raised.

Neither the complaint nor the evidence is fatally defective or uncertain. The claim is for spirits of turpentine and rosin taken from certain described lands. That it was the crude and not the manufactured product that was in a literal sense taken from the land is of no consequence. The land is referred to only to identify the chattels, conversion of which is alleged. Whether there was an error in the particular description of the lands, as is insisted, is a matter of no serious consequence, for they were otherwise described as the "Louis I. Freeland Homestead," and there was uncontradicted evidence that the lands referred to, and no others, were known by this description. That the evidence did not show precisely what quantities of turpentine spirits and rosin, manufactured from the crude turpentine taken from the homestead, were received by the plaintiff in error, was not ground for a peremptory instruction to find for defendant or to limit the recovery to nominal damages, since there was evidence from which the jury could form a reasonably certain estimate of the amount of crude taken from the homestead during the

years in question, and the amount of spirits and rosin that this probably yielded.

There was no error in charging that "the boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, willful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed." This refers, of course, as other parts of the charge clearly show, to a manufacture by Rayford, who was himself the trespasser.

The rights and privileges of an entryman with reference to standing timber were considered and discussed in *Shiver* v. *United States*, 159 U. S. 491, 497, 498, where, after reviewing the pertinent sections of the Revised Statutes, it was said: "From this résumé of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; . . . third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation. . . . It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law

contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. . . . By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation."

There is nothing in the letter or policy of the homestead act that permits the boxing and chipping of pine trees for the purpose of extracting turpentine for sale and profit. It cannot be regarded as cultivation within the meaning of the act; it affects the value of the inheritance too seriously for that. As is well known, the process requires the cutting of a deep gash or "box" into the side of the tree, so shaped as to catch and retain a considerable quantity of the crude gum, and repeated chippings thereafter, by each of which an additional portion of the bark is cut through to the wood so as to expose a fresh bleeding surface. It not only saps the vital strength of the tree and lessens its power to resist the force of the wind, but exposes the wood to decay and to wood-boring grubs and beetles; while the waste gum, being highly inflammable, increases the danger of forest fires. Government publications have repeatedly pointed out the ill effects of the practice.[1]

The recognition of these evils led Congress to pass the

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[1] "A New Method of Turpentine Orcharding," Bulletin No. 40, Bureau of Forestry, 1903, pp. 9–13; "The Naval Stores Industry," Bulletin No. 229, Department of Agriculture, July 28, 1915; "Conservative Turpentining," Senate Doc. 676, 60th Cong., 2d Sess., Vol. 11, p. 498. See also 1 Land Dec. 607; 4 Land Dec. 1; 5 Land Dec. 389; 36 Land Dec. 302.

act of June 4, 1906, ch. 2571, 34 Stat. 208, now found in Crim. Code, § 51 (act of March 4, 1909, ch. 321, 35 Stat. 1088, 1098). It is true that in *Bryant* v. *United States* (1901), 105 Fed. Rep. 941, the Circuit Court of Appeals for the Fifth Circuit, in holding that boxing for turpentine was not a criminal offense within the meaning of § 246, Rev. Stat., said, *obiter*, "We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroy the value of the trees as timber, or that it has a tendency even to retard the growth of the trees," and that this view was made the basis of a decision by the Circuit Court of Appeals for the Eighth Circuit that prior to the act of 1906 the boxing of trees for turpentine on public lands was not actionable. *United States* v. *Waters-Pierce Oil Co.*, 196 Fed. Rep. 767, 769. We are clear, however, that the act of 1906 only rendered criminal that which before was actionable because not included in any right or privilege expressly or by implication conferred upon the homesteader by the act of Congress. So the Circuit Court of Appeals for the Fifth Circuit held in *Parish* v. *United States*, 184 Fed. Rep. 590. And see *United States* v. *Taylor*, 35 Fed. Rep. 484.

Rayford, in conducting his turpentining operations upon the homestead with notice that the land was the property of the United States, became a willful trespasser, although he may have supposed, as he is said to have declared, that there was "no law against it." He acted with full notice of the facts, and his mistake of law cannot excuse him.

Upon the facts as the jury must have found them, the distillation by Rayford of the gum that was taken from the Government's land was a continuing act of trespass that did not divest the United States of its property but left it still entitled to the manufactured products. *The Distilled Spirits*, 11 Wall. 356, 369. If the doctrine of confusion of goods were to be applied, the entire product of the still would belong to the United States. *The*

"*Idaho*," 93 U. S. 575, 586. But by the instructions of the trial judge recovery was limited to the value of the products manufactured from crude gum taken from the Freeland Homestead.

It is ingeniously argued that a different rule must govern as between the United States and the defendant company, because the company had a mortgage upon Rayford's product, both crude and manufactured; that the crude stuff as soon as it reached the still was inextricably mixed with a much greater quantity to which Rayford had an unquestioned title which passed to defendant at once by virtue of the mortgage, and that the evidence shows such hopeless confusion and admixtures of unknown quantities and varying qualities of gum that no reasonable ascertainment of the rights of the parties as tenants in common is possible; therefore, the Government property, being relatively small in value, passed to defendant under the doctrine of accession. It is less confidently argued that the same result would apply even as between the lawful owner and a willful trespasser; but this we deem clearly untenable. One who knowingly takes the property of another cannot, by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession. *The Distilled Spirits*, *supra*; *Silsbury* v. *McCoon*, 3 N. Y. 379; 53 Am. Dec. 307, 315, *note*.

The argument based upon the mortgage is confronted with this obstacle, to say nothing of others: that the mortgage and the shipping contract alike contemplated that Rayford should manufacture the crude turpentine into spirits and rosin and ship these to defendant, and such was the actual course of dealing thereunder. Defendant at no time asserted any lien upon or property in the crude material by virtue of the mortgage. And even if it were now permitted by a fiction to assert ownership in all that part of the crude gum which was the lawful property

of Rayford, as of the time that it reached his still, it must perforce place itself in the position of employing Rayford as its agent for the purpose of distilling the turpentine. Now Rayford, in doing this, placed with it a comparatively small, but still substantial, quantity of crude turpentine that was the property of the United States. Defendant cannot take a benefit from the distilling operations thus conducted by Rayford without at the same time assuming a responsibility for that which he did; and what he did in distilling the Government's gum was a continuing trespass, that left the United States entitled to its property in its changed form, the same if the distilling was done by Rayford under an agency from defendant, as if done on his individual account.

And of course, if defendant's title dates from the time of the delivery to it of the manufactured product, it can take no greater interest than that which Rayford held.

Thus, whether we indulge the fiction, or whether we adhere to the practical fact, which is that Rayford under the contract delivered manufactured products to defendant, the latter can take no credit for the work and labor bestowed upon the turpentine by the wrongdoer, but must answer for its value as manufactured products. *Wooden-ware Co.* v. *United States*, 106 U. S. 432, 435; *Guffey* v. *Smith*, 237 U. S. 101, 119.

The after-acquired-property clause in the mortgage does not help matters for defendant. Property in the turpentine could not be acquired by Rayford without the consent of the United States, and this he did not have. See *Holt* v. *Henley*, 232 U. S. 637, 640; *Detroit Steel Co.* v. *Sistersville Brew. Co.*, 233 U. S. 712.

It is insisted that if a tenancy in common existed in the manufactured product, the possession of it by defendant company was not tortious, and that in order to show a conversion there must be either a demand for possession and refusal thereof, or a showing that some

disposition was made of the chattels inconsistent with and destructive of the rights of plaintiff as co-tenant. But, taking the shipping contract and the mortgage with the testimony and admissions as to the course of business carried on thereunder, the jury was fully warranted in finding that defendant had converted the manufactured products by selling them soon after they were received, and accounting to Rayford for the proceeds. The question of conversion was submitted to the jury, with a proper instruction that in such event a demand for possession was futile and therefore unnecessary.

The trial court instructed the jury that recovery should be based upon the market value of the spirits and rosin at the time they were received by defendant, and it is insisted that the value at the time of the conversion ought to have been taken instead. As to this it is sufficient to say that, except as it was to be inferred that probably the manufactured products were sold not long after their receipt by defendant, there is nothing to throw light upon the time that intervened between receipt and sale; and while by stipulation the highest and lowest market prices for turpentine and for rosin during the years 1904 and 1905 were shown, it did not appear at what time the prices were high, and at what time low. In short, the evidence contained nothing to aid the jury in distinguishing between the market price at the time of receipt and the market price at the time of sale. Defendant did nothing—if it could—to elucidate the matter by evidence, nor did its exceptions call the attention of the trial judge to the point now insisted upon.

Minor points are raised, but none that seems to call for discussion.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

O'KEEFE, RECEIVER OF NEW ORLEANS, TEXAS & MEXICO RAILROAD COMPANY, *v.* UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 516. Argued December 15, 1915.—Decided February 21, 1916.

The Interstate Commerce Commission has jurisdiction to make an order requiring trunk line railways to reopen through routes and publish joint rates to interstate destinations with tap lines with which they have connection, and to prohibit the trunk lines from making to any tap line an allowance or division out of the joint rates in excess of a maximum prescribed.

The order in this case was not based on erroneous principles of law, nor did it exclude competitive conditions from consideration, but the Commission established maximum divisions for the purpose of preventing preferences, discriminations and rebates as methods of competition.

This court will presume that the Interstate Commerce Commission is expert in matters of rate regulation and able to draw inferences from the facts before it that are not necessarily obvious to others; and, in this case, *held* that from the record it appears that the tap line problem is so complex and the importance of a general rule for allowances to tap lines based on simple elements is so obvious, that this court will not hold that the adoption of a mileage basis for such allowances is sufficient to sustain a charge of arbitrary action.

A trunk line has no constitutional right to build up its business by doing acts that Congress has forbidden from considerations affecting public welfare; and an order of the Interstate Commerce Commission prescribing maximum rates, if otherwise legal, does not deprive a trunk line of its property without due process of law by denying it the right to compete for business in that manner.

Quære, whether a trunk line can object to an order of the Interstate Commerce Commission prescribing maximum allowances to connecting lines on the ground that the allowance is too small and, therefore, deprives it of the opportunity to pay a larger amount and obtain the business.

THE facts, which involve the validity of an order of the Interstate Commerce Commission establishing maximum allowances to and divisions of joint rates, with tap lines by trunk lines, are stated in the opinion.

Mr. H. Generes Dufour and *Mr. Walter F. Taylor*, with whom *Mr. Morgan M. Mann* was on the brief, for appellant.

Mr. Assistant Attorney General Underwood for the United States, *Mr. Joseph W. Folk* for the Interstate Commerce Commission.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a decree dismissing a bill filed by appellant, as Receiver of the New Orleans, Texas and Mexico Railroad Company, against the United States and the Interstate Commerce Commission, praying the annulment of an order of the Commission, dated July 29, 1914, made in the *Tap Line Cases*, following the decision of this court reported in 234 U. S. 1. The order required certain trunk line railway companies, including the New Orleans, Texas & Mexico, to reopen through routes and publish joint rates to interstate destinations with certain tap lines, including Louisiana and Pacific Railway Company, with which appellant's road had and has a connection, and prohibited any of the line carriers from making to any of the tap lines an allowance or division out of the joint rates in excess of maximum amounts prescribed as follows:

"For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles and not more than 6 miles from the junction 1½ cents per 100 pounds; over 6 miles and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles and not more than 20 miles from the junction,

2½ cents per 100 pounds; over 20 miles and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles and not more than 40 miles from the junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds."

The following is an outline of the history of the case. After the supplemental report of the Commission in *Star Grain & Lumber Co.* v. *Atchison, Top. & Santa Fe Ry.*, 14 I. C. C. 364, 372; 17 I. C. C. 338, in which the making of allowances and divisions to tap lines for the traffic of proprietary mills was condemned, although no formal order was entered, the trunk lines, including the New Orleans, Texas & Mexico, filed cancellation of tariffs theretofore filed providing for joint rates with various tap lines, including the Louisiana & Pacific. Certain of the tap lines filed complaints with the Commission requesting that through routes and joint rates with trunk lines be enforced. The Commission thereupon investigated the tap line situation with reference to lumber operations in the States of Arkansas, Missouri, Louisiana, and Texas. Pending this investigation, the cancellation of joint rates was suspended from time to time. On April 23, 1912, the Commission filed its report, and on May 14, 1912, its supplemental report (23 I. C. C. 277, 549) and in orders dated May 14 and October 30, 1912, based upon these reports, it found that the tracks and equipment of the tap lines with respect to the industry of the proprietary lumber companies were plant facilities, and the service performed for the proprietary companies in moving logs to the mill and mill products to the trunk line was not a transportation service by a common carrier railroad, but a plant service by a plant facility, and that any allowance or division out of the rate on account thereof was unlawful and resulted in undue and unreasonable preferences and unjust discriminations; and the order of October 30 required the trunk lines, including the

New Orleans, Texas & Mexico, to desist and abstain from making any such allowance to any of the tap lines mentioned. Certain of the tap lines, including the Louisiana & Pacific, filed petitions in the Commerce Court to annul this order. The court granted this relief (209 Fed. Rep. 244), and its decision was affirmed by this court, 234 U. S. 1, the court holding that the Commission exceeded its authority in condemning the tap line railroads, when duly incorporated as common carriers under the state laws, as being a mere attempt to evade the commerce law and secure rebates and preferences for themselves. At the same time the court said (p. 28):

"It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and (to) discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as non-proprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed does not at all decide, that the division of such joint rates may be made at the will of the carriers involved and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the

service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."

After this decision, the Commission, after a rehearing and further argument but without taking further testimony, and upon the same record on which its orders of May 14 and October 30, 1912, had been entered, made further findings (31 I. C. C. 490), upon which was based the order of July 29, 1914, now under attack.

The New Orleans, Texas & Mexico Railroad Company operates, directly and through stock ownership of other companies, a system of railroad extending from New Orleans across the States of Louisiana and Texas. The Louisiana & Pacific Railway Company, incorporated under the laws of the State of Louisiana, owns and operates a tap line within that State, including approximately 80 miles of main and branch lines, its main line extending from De Ridder southerly to Lake Charles, approximately 45 miles, crossing and forming a junction with the main line of the New Orleans, Texas & Mexico at Fulton, which is about 25 miles from De Ridder and 19 miles from Lake Charles. The Louisiana & Pacific connects also with the following trunk lines: At De Ridder, with the Gulf, Colorado & Santa Fe and the Kansas City Southern; at Bon Ami (near De Ridder), with the Kansas City Southern; and at Lake Charles, with the Louisiana & Western (Southern Pacific Company), the Kansas City Southern, and the St. Louis, Iron Mountain & Southern. Located along the line of the Louisiana & Pacific are certain lumber mills, which are called proprietary mills because controlled by the same interests which own the stock of the Louisiana & Pacific. Some of these are at De Ridder, Bon Ami, and Longville, all of which points are north of Fulton, while one is at Gossport, near Lake Charles. At Bannister and Ragley, on the line of the Louisiana & Pacific, north of Fulton, there are non-proprietary mills.

In the year 1906, before the construction or definite location of the New Orleans, Texas & Mexico, an agreement was made between that company, then known by another name, on the one hand, and the Louisiana & Pacific and the various companies owning the proprietary mills, on the other, whereby the Louisiana & Pacific and the lumber companies agreed to give a substantial amount of their tonnage to the New Orleans, Texas & Mexico upon a division of the joint rates approximating 35%, not exceeding, however, in any case, 5½ cents per hundred pounds. The lumber tonnage which, pursuant to this arrangement, the New Orleans, Texas & Mexico expected to receive and did, until the order of July 29, 1914, actually receive, was a great inducement for the company to locate its line through the territory where it is located. During the five fiscal years prior to July, 1914, its lumber tonnage amounted to 37.45% of its total gross, and of this the Louisiana & Pacific supplied approximately one-third, or about 13% of the total gross tonnage. Since the order of July 29, 1914, the New Orleans, Texas & Mexico has been deprived of practically all of this tonnage, which has been diverted to the other trunk lines because the Louisiana & Pacific, in order to gain as large a division of the joint rate as possible, moves its lumber tonnage from points near the northerly end of its line across the line of the New Orleans, Texas & Mexico, and delivers it to the trunk lines at the southerly end of its line; and also takes tonnage originating near the southerly end of its line, carries it across the line of the New Orleans, Texas & Mexico, and delivers it to trunk lines at or near its northerly terminus. It is said that the practical effect of the Commission's order results always to the disadvantage of the New Orleans, Texas & Mexico with respect to traffic originating upon the line of the Louisiana & Pacific, and that the disadvantage is in no case less than 1 cent per hundred pounds, or approximately $5 per

car. A single illustration will suffice. From the mill at Longville to the junction of the New Orleans, Texas & Mexico the distance is 8.2 miles, so that if the product of this mill were shipped over appellant's road, the Louisiana & Pacific would receive only 2 cents per hundred pounds, or $10 per car; whereas by carrying the product beyond Fulton to Lake Charles, and there delivering it to a trunk line, the Louisiana & Pacific receives a division of 3 cents per hundred; or by taking the Longville product to De Ridder, the Louisiana & Pacific likewise receives 3 cents per hundred. As the trunk lines all operate under a common blanket rate on lumber for this territory, the through rate is the same in all circumstances, and the proprietary mills route their shipments in such manner as to give to the Louisiana & Pacific the largest possible division, always to the disadvantage of the New Orleans, Texas & Mexico.

It is insisted by appellant that the Commission was without power to prescribe maximum divisions, as was done by the order of July 29, 1914, because no joint rate was fixed, either by the Commission or by the parties, and they had not been afforded an opportunity to agree in respect to the division. This is based upon the view that § 15 of the Commerce Act as amended (Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551), contains only two provisions dealing expressly with the division of rates, the first being applicable where the carriers fail to agree among themselves upon the division, the other where the carriers have refused or neglected to establish through routes or joint rates voluntarily. Without stopping to consider whether the circumstances of this case bring it within either of these provisions, we deem it clear that to regard these only is to take too narrow a view of the scope of the section. The first part of the same section enacts—"That whenever . . . the commission shall be of opinion that any individual or joint rates

or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of . . . property . . . or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers . . . are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist," etc. And a later part of the same section (p. 553) prescribes: "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order," etc.

In the case in 234 U. S. 1, this court did not ignore, but fully recognized, the significance of the community of interest between the lumber company and the tap line. It was pointed out (p. 27) that timber and its manufactured products were exempted from the absolute prohibition of the Commodity Clause of the Hepburn Act (of June 29, 1906, ch. 3591, 34 Stat. 584, 585). But this was regarded as one of the circumstances rendering it important that the Commission should deal with the abuses

found to exist in the division of joint rates with the tap lines, not by abolishing them altogether, but by "reducing the amount so that a tap line shall receive just compensation only for what it actually does." So, in *Interstate Com. Comm.* v. *Diffenbaugh*, 222 U. S. 42, 46, the court said: "The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum." Again, in *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, 445, it was said: "The intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by section 15."

We are clear that the Commission had jurisdiction to make the order of July 29, 1914.

Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration, but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates, as methods of competition.

It is insisted that there was no evidence before the Commission to sustain its finding to the effect that any allowance or division in excess of the limits prescribed would result in undue preference and unjust discrimination. This, of course, is to be tested by a consideration of the evidence that was before the Commission. The report and supplemental report of April 23 and May 14, and the orders of May 14 and October 30, 1912, and the

oral evidence and main exhibits before the Commission from the beginning of the tap line investigation to the making of the order last mentioned were offered in evidence. Appellant, however, has printed only a small part of the testimony, being that which especially relates to the Louisiana & Pacific Railway, its organization, ownership, manner and cost of construction, operating revenue and expenses, accumulated surplus, etc. But, besides these details as to this line, the Commission had before it, as its reports show, a mass of evidence relating to numerous other tap lines, operated under somewhat similar circumstances, including evidence as to the allowances actually made to them out of the joint rate. Evidence of what was allowed on these tap lines had a tendency to show what was reasonable and therefore permissible upon other tap lines, including the Louisiana & Pacific. It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others. Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. It is admitted that distance is an element properly to be considered; but appellant insists

that terminal service, the origin of traffic, etc., are more important elements. This is an administrative question. The tap line problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

The final contention, which is that the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound. The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by act of Congress for considerations affecting the public welfare.

We are not to be understood as conceding that appellant is in a legal sense aggrieved by the action of the Commission in limiting the allowance to the tap line. The case is singular, in that neither this tap line nor any tap line is complaining that the allowance is too small; nor is any trunk line complaining that it is too great. The real basis of appellant's complaint, representing a trunk line carrier, is that the allowance to the tap line is too small. It is questionable whether it lies in the mouth of the line carrier to object on this ground.

We recognize the exceptional situation in which appellant's road is placed, and the hardship that results to it from the application of the order of July 29, 1914, to the traffic originating upon the line of the Louisiana & Pacific. After that order, the New Orleans, Texas & Mexico and the Louisiana & Pacific undertook to agree upon through routes and joint rates, with divisions not greater than those allowed by the Commission, but said to be equalized so as to enable the New Orleans, Texas & Mexico to com-

pete on equal terms with the other trunk lines. This agreement, so far as appears, has not been submitted to the Commission for its approval or disapproval, and we intimate no opinion upon the question whether that body ought to approve it.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

CAROLINA GLASS COMPANY *v.* STATE OF SOUTH CAROLINA.

SAME *v.* MURRAY ET AL., CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

SAME *v.* MURRAY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

SAME *v.* MURRAY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Nos. 12, 9, 205, 204. Argued January 20, 1916.—Decided February 21, 1916.

A glass manufacturing company, which had furnished supplies to the State and various county dispensaries of South Carolina, presented, pursuant to statute providing therefor, its claim for balance due to the State Dispensary Commission appointed to close up the business

and which found that the glass company had been overpaid on previous settlements an amount exceeding its claim; and, after allowing the claim, found the glass company was indebted to the State for a specified amount, and entered an overjudgment therefor which the State attempted to collect; the glass company appealed to the state Supreme Court, and also instituted independent proceedings in the state and Federal courts to restrain the members of the Commission from enforcing the overjudgment or from withdrawing funds from the county dispensaries and to recover sums so withdrawn against the individual members of the Commission. From the adverse judgment of the District Court, writs of error were taken from this court and also from the Circuit Court of Appeals. All the cases were considered together by this court, and *held* that;

The State Dispensary Commission had jurisdiction to consider, find and offset claims of the State against one claiming for supplies furnished to the dispensaries; and, even though it had no power to render an overjudgment, it did not deprive the claimant of its property without due process of law by making such offset.

The state court did not err in holding that although the overjudgment was rendered without authority by the Commission, that fact did not affect the power of the Commission to withdraw funds from the county dispensaries as they were state funds and subject to its control.

The glass company, as creditor of the State, could not assert rights against the withdrawal by state officers of funds of the State under their control in regard to which the State had not consented to be sued; and the withdrawal in this case did not amount to the impairment of contract obligations within the meaning of § 10, Art. I, of the Federal Constitution.

The funds of the State Dispensary of South Carolina involved in these actions were funds of the State (*Murray* v. *Wilson Distilling Co.*, 213 U. S. 151) and the suit against members of the State Dispensary Commission was in effect a suit against the State and could not be maintained in the District Court of the United States.

Where there are no allegations of diverse citizenship and the jurisdiction of the Federal court is invoked solely on constitutional grounds, the writ of error issues direct from this Court and the Circuit Court of Appeals is without jurisdiction to review.

87 S. Car. 270, 285, affirmed.

197 Fed. Rep. 392, affirmed.

Writ of error to review 206 Fed. Rep. 635, dismissed.

THE facts, which involve the construction of the Dispensary Laws of South Carolina and rights of one claiming to have furnished supplies to the dispensaries, are stated in the opinion.

Mr. William H. Lyles, with whom *Mr. David W. Robinson* and *Mr. Jo-Berry S. Lyles* were on the brief, for plaintiff in error.

Mr. Benjamin Lindsey Abney, with whom *Mr. Thomas H. Peeples* was on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These suits grew out of the legislation by which South Carolina sought to control traffic in liquors. They involve closely related matters, were heard together, and it will be convenient likewise to dispose of them. In *Scott* v. *Donald*, 165 U. S. 58; *Vance* v. *Vandercook*, 170 U. S. 438, and *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, the history and general purposes of the legislation are considered.

By act of 1892 the General Assembly created a State Board of Control, with power to supervise the traffic; also provided for a State Commissioner charged with the duty of purchasing and distributing liquors through local officers known as dispensers.

The statute of 1896 directed election, by the General Assembly, of the Board of Control and gave it power to make purchases and to appoint a Commissioner who should supply local dispensers selected by and under direction of County Boards. By an amending act of 1900 the Board then existing was abolished; a Board of Directors of the State Dispensary was created, with power to prescribe rules and regulations to govern dispensaries,

both State and County; and provision was made for the election of a Dispensary Commissioner. The new Board was required to purchase liquor for lawful use within the State; and general management and control of the State Dispensary was entrusted to the Commissioner.

A legislative committee was appointed in 1905 to investigate the State Dispensary. In 1907 the statute of 1896 was repealed; control through a state board was abolished and county boards substituted, clothed with authority to purchase "in the name of this State" all liquors to be sold within their several counties, "*Provided*, That the State shall not be liable upon any contract for the purchase thereof beyond actual assets of the Dispensary for which the purchase is made." At the same time another act created a State Dispensary Commission of five, gave it control of all funds, assets and property other than real estate of the State Dispensary, required it to investigate all facts concerning outstanding claims against the State Dispensary and, thereafter, to pay all just liabilities from dispensary assets which might come into its hands. This second act of 1907 was amended in 1908, and the Commission given "full power to pass upon, fix and determine all claims against the State growing out of dealings with the Dispensary; and to pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the Dispensary which have been or may hereafter be collected by said Dispensary Commission: *Provided*, That each and every person, firm or corporation, presenting a claim or claims to said Commission, shall have the right to appeal to the Supreme Court, as in cases at law."

By act of February 23, 1910, findings of the State Dispensary Commission were declared to be final; any sum ascertained to be due the State was required to be deducted from whatever a county dispensary might owe such debtor; and authority was given the Commission to

command any county dispensary so indebted to turn over to it an equivalent amount of money. Notices of claims in favor of the State, creation of liens to secure the same, and enforcement of their payment were also provided for.

NUMBER 12.

The history and disposition of this cause in the state tribunals sufficiently appear from parts of the opinion by the Supreme Court (87 S. Car. 270) quoted below, p. 279:

"The investigations of the committee [appointed 1905] resulted in an act, passed in 1907, authorizing the appointment of a commission, to be known as the State Dispensary Commission, whose duty it was to close out the entire business and property of the State Dispensary, collect all debts due, and pay 'all just liabilities' of the State growing out of said business. The Commission was given 'full power and authority to investigate the past conduct of the affairs of the dispensary.' It was also clothed with all the power and authority conferred upon the Committee, which had been appointed under the resolution above referred to. 25 Stat. [So. Car.] 835. The act of 1907 was amended in 1908 so as to give the Commission 'full power to pass upon, fix and determine all claims against the State growing out of dealings with the dispensary; and to pay for the State any and all just claims which have been submitted to and determined by it, and no other.' 25 Stat. 1289.

"Appellant presented to the Commission a claim for $23,013.75 as the balance due it by the State for bottles and demijohns furnished to the dispensary under contracts made with the board of directors from and including April, 1906, until the business was closed out by the Commission. Appellant had also furnished the dispensary practically all the bottles and demijohns used since about December, 1902; but all accounts prior to April, 1906, had been settled.

"Upon the filing of this claim, the Commission went into an investigation of all past dealings of appellant with the dispensary; and, after hearing a great deal of testimony and argument thereon, rendered its decision, dated Nov. 17, 1909, which will be set out in the report of the case.

"The conclusion and finding of the Commission was that, in pursuance of a conspiracy between some of the directors of the dispensary and some of appellant's officers or agents to defraud the State whereby legitimate competition was destroyed, appellant had a monopoly of the business of furnishing glass to the dispensary from the date of its beginning business, in 1902, until April, 1906; and that the prices paid it for glass during that period exceeded the fair market value thereof by $51,432.99. Therefore, allowing appellant's claim of $23,013.75, the Commission found that appellant was indebted to the State in the sum of $28,419.24, the difference between the amount of its claim and the sum it had fraudulently collected from the State.

"From that decision, this appeal was taken, under the provisions of the statute, giving every claimant the right of appeal to the Supreme Court, 'as in cases at law.' Appellant concedes that the jurisdiction of this court is limited in such cases to a review of alleged errors of law. . . .

* * * * * * * *

"The next contention of appellant is that the Commission is not a court, but a special tribunal of limited power, and that it exceeded its authority in undertaking to fix and determine appellant's liability to the State, and then set off its claim against the liability so fixed. It is conceded that the Commission is not a court, though its duties necessarily involve, to some extent, the exercise of judicial functions, as is always the case where judgment and discretion are to be exercised. It was created under Section 2 of Article 17 of the constitution, which provides

that 'the general assembly may direct by law in what manner claims against the State may be established and adjusted.'

* * * * * * * *

"The question, therefore, whether the Commission had authority to entertain a 'set-off' or 'counter claim' in favor of the State against a claimant, in the technical sense in which those terms are used in legal proceedings is not germane or material to the present inquiry. To what purpose should the Commission investigate, unless it announced the result of its investigation? We see no error, therefore, in the Commission stating its findings as the result of its investigation.

"The findings of the Commission, however, are controlling only in its determination of the non-liability of the State upon appellant's claim. They have not the force or effect of a judgment, concluding appellant in any other proceeding—such, for instance, as the State might institute in the proper court to recover the amount found by the Commission to be due it by appellant.

* * * * * * * *

"The judgment of this court is that the decision of the Commission upon plaintiff's claim against the State be affirmed, . . ."

Manifestly, we think, the Supreme Court affirmed the Commission's action only in so far as it declined to approve the glass company's claim—there was no final determination of the State's right to recover over against the company.

Error is assigned concerning supposed Federal questions upon the theory that there has been "in practical effect an adjudication of the validity of the alleged claim of the State arising out of the ended transactions prior to April, 1906, and a satisfaction of such a judgment by the confiscation of plaintiff in error's property; that is, its claim against the State for goods furnished since 1906."

This theory is entirely out of harmony with the Supreme Court's opinion, which holds the validity of possible demands against the glass company remains wholly undetermined and that, acting within its plain powers, the State had only refused to recognize and discharge a claim against itself. The argument of counsel proceeds upon a fundamental misconception. We find no error in the judgment below, and it must be affirmed.

NUMBER 9.

By this original proceeding begun in the Supreme Court of South Carolina, March 4, 1910, the Carolina Glass Company sought to restrain any effort to collect the so-called overjudgment for $28,419.24 pronounced by the Dispensary Commission under circumstances narrated *supra* (cause No. 12); and also to prevent the Commission from demanding or receiving sums of money alleged to be due the company from certain county dispensaries or interfering with payment of such indebtedness.

Quotations from the opinion below (87 S. Car. 270, 285) will adequately disclose the issues involved.

"These arise principally out of an act approved February 23, 1910, and what was done by the defendants under the provisions of that act, which, it will be noted, was passed subsequent to the decision of the Commission upon the claim of the plaintiff. The provisions of the first five sections of the act pertinent to this case are, in substance: That, in addition to the powers conferred by all previous acts, the Dispensary Commission shall have power to pass upon, fix and determine claims of the State against any person, firm or corporation heretofore doing business with the State Dispensary, and settle and receipt therefor; that the findings of the Commission under its provisions shall be final, and, upon the finding by the Commission that any person, firm or corporation is indebted to the State, the dispensary auditor and officials

having charge of the funds of any county dispensary which may be indebted to such person, firm or corporation, shall pay to the Commission the amount so found to be due the State, or so much thereof as the funds in their hands due to such person, firm or corporation will pay, and the receipt of the Commission shall be a sufficient voucher therefor; that the Commission may, by its order, stop the paying out of any funds of any county dispensary by any officer having charge thereof. Sections 7 and 9 of the act are as follows: [They are copied in margin.] [1]

"Within a few days after the approval of the act, to wit, on February 26, 1910, the Commission, by its attorneys, filed in the office of the clerk of the Court for Richland county, in which county plaintiff owned real estate, a notice, headed or entitled, *The State* v. *Carolina Glass Co.*, and signed by the Attorney General and other counsel

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[1] SEC. 7. "The State Dispensary Commission is hereby empowered to pass all orders and judgments and do any and all things necessary to carry out the purposes of this act; and all judgments rendered by them for any claim due the State shall be a lien on the property of the judgment debtor situated within this State, and a transcript of said judgment shall be filed in the office of the clerk of the Court of Common Pleas in each county where any property of such judgment debtor is situated."

SEC. 9. "In all cases pending before the said State Dispensary Commission, upon any claim or claims against any person or persons or any corporation or corporations owning any real estate in any county in this State, the said Commission shall file in the office of the clerk of court in each county where such real estate is situated a notice of the pendency of such cases, and the said notice so filed shall be full notice to all persons whomsoever claiming any title to or lien upon such real estate acquired subsequent to the filing thereof, and the debt found by said Commission to be due the State shall have priority over the claims of all creditors, except creditors secured by mortgage or judgment entered and recorded prior to the filing of such notice, and the said real estate, in the hands of any person or persons whomsoever, shall be liable for the payment of such debt so found to be due the State."

representing the State. The notice was as follows: 'Notice is hereby given to all whom it may concern, that the above stated cause has been instituted, and is now pending before the State Dispensary Commission for the recovery against the Carolina Glass Company of $29,000.00, the amount which has been found to be due from the said defendant to the State of South Carolina owing to overcharges made by said defendant in selling goods to the State Dispensary, and this notice is given in accordance with the terms of an act of the legislature passed in February, 1910, and duly approved by the Governor.' About the same time, notice was served on the plaintiff, pursuant to the provisions of the act, that the Commission would proceed to pass upon, fix and determine the claim of the State against the plaintiff on account of the overcharges growing out of its dealings with the dispensary. Notice was also served on the County Dispensary Board of Richland county, requiring that board to pay to the Commission the amount due by said board to the plaintiff.

"Another feature of the case grows out of an agreement alleged to have been made between the attorneys for the plaintiff and the attorney representing the State with regard to payments for shipments of glass made by plaintiff to the county dispensaries after November 20, 1909. . . .

* * * * * * * *

"Under the provisions of the Constitution (Art. VIII, Sec. 11) and statutes (25 Stat. 463) the county dispensaries are conducted 'under the authority and in the name of the State.' Therefore, the officers in charge of them are agents of the State and the funds arising from the sale of liquors through them are the funds of the State, and the debts due for goods sold to them are the debts of the State. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the State, 'subject to no interference,

except that of the General Assembly itself,' and a suit brought against it is, in effect, a suit against the State. *State* v. *Dispensary Commission*, 79 S. Car. 316, 329, 60 S. E. Rep. 928. As the State cannot be sued without its consent, no court has power to interfere with or direct the disposition of the State's funds in the hands of its agents, unless it appears that they are acting without authority of law, or are refusing to recognize and obey the law to the detriment of private rights. . . . In ordering the funds in the hands of the officers of the county dispensaries due to the plaintiff turned over to itself, the Commission acted within the limits of its authority and discretion conferred upon it by the legislature, and this court has no power to interfere. From the foregoing, it will be seen that it is unnecessary to inquire or decide whether there was an agreement between the attorneys for plaintiff and the attorneys for the State as to the collection of the amounts due plaintiff from the county dispensaries for shipments made prior to November 20th, or what the agreement was, or whether it has been violated. The Dispensary Commission is the sole arbiter of the rights of the plaintiff, if it has any, with regard to that matter.

* * * * * * * *

"So long, therefore, as the action of the Commission was confined to the investigation of all dealings, past and present, with the dispensary, and the determination of the just liabilities of the State growing out of them, it was, as we have seen, based upon constitutional authority, and was valid and binding. But we find no authority in the Constitution for the legislature to provide by law how claims of the State against others shall be established or adjusted, except through the courts. We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the State against the plaintiff, it is unconstitu-

tional, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void."

Defendants were accordingly enjoined from asserting a lien upon the company's property and the notice filed in Richland County was directed to be cancelled; but the Commission's power to remove funds from county dispensaries was upheld.

Plaintiff in error now maintains the so-called overjudgment of November 17, 1909, was void; that by reason of claims against them it had contract and property rights in money held by the county dispensaries; and that removal of funds therefrom by the State Dispensary Commission impaired contract obligations in violation of § 10, Article I, Federal Constitution, and deprived it of property without due process of law.

It was distinctly adjudged by the Supreme Court that the Dispensary Commission was without power to pronounce the overjudgment; that it was invalid and could not be enforced. In view of repeated holdings by that court and our opinion in *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, it is clear that funds of county dispensaries were state funds, and, as such, subject to control by the Dispensary Commission. Their removal, therefore, violated no right which the glass company could assert—the State had not consented to be sued. The judgment of the court below must be affirmed.

Number 205.

The Carolina Glass Company instituted this proceeding at law in the United States District Court, South Carolina, December 13, 1911, to recover judgment against individual members of the Dispensary Commission for sums of money said to have been unlawfully withdrawn by them from county dispensaries which held the same for plaintiff's benefit. It is alleged that for supplies furnished partly be-

fore and partly after February 23, 1910, these county dispensaries became lawfully indebted to the company for more than $19,000, and that the money in their keeping was held in trust to pay such sum, and further:

"That the said defendants, undertaking to proceed under section 6 of the Act entitled 'An Act to further provide for winding up the affairs of the State Dispensary,' approved the 23d day of February 1910, [copied in margin] [1] as this plaintiff is informed and believes, demanded from the County Dispensary Boards for the County of Clarendon, the County of Richland and the County of Georgetown, the sums of money alleged in paragraph six of this complaint, amounting in the aggregate to the sum of nineteen thousand and eighty-four and 38/100 dollars then due to this plaintiff by said several County Dispensary Boards, as alleged in said paragraph six, and unlawfully and wrongfully received the said sums of money from said several County Dispensary Boards, claiming that they were entitled to the same on account of the above mentioned illegal offset found by said State Dispensary Commission to be due by this plaintiff as aforesaid; which action this plaintiff alleges was wholly without authority of law, as the provisions of said section 6 of the Act of February 23d, 1910, were unconstitutional, null and void, as constituting an effort, unwarrantably and without authority, to confiscate the property of this plaintiff without due process of law, the provisions of said section being

[1] SEC. 6. "In any and all cases where the State Dispensary Commission has heretofore found any amount due the State by any person, firm or corporation on account of dealings with the State Dispensary, the several County Dispensary Boards now existing, and all boards and other officer or officers in charge of any money due any such person, firm or corporation on account of any dealings with any and all County Dispensaries heretofore existing, shall, upon demand, pay to the State Dispensary Commission a sufficient amount, or so much thereof as may be on hand, to cover the amount so found to be due the State."

in violation of section 10 of Article I of the Constitution of the United States, and also of the Fourteenth Amendment to the Constitution of the United States; and, furthermore, in violation of the express contract and agreement entered into by this plaintiff with the defendants above named as above alleged."

Holding it in effect a suit against the State, the District Court dismissed the cause (197 Fed. Rep. 392); and it is here upon direct writ of error. We are of opinion that the action of the court below was correct. And in view of what has been said above and our opinion in *Murray* v. *Wilson Distilling Co.*, further discussion of the questions involved would not be profitable. The judgment is affirmed.

NUMBER 204.

This writ brings up a judgment rendered by the Circuit Court of Appeals, Fourth Circuit, affirming the same final judgment of the District Court considered in No. 205, *supra*. 206 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

In such circumstances the Circuit Court of Appeals is without jurisdiction to review. *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73. Its judgment is accordingly reversed and the cause remanded with directions to dismiss the writ of error improperly entertained.

Judgments in Nos. 12, 9 and 205, affirmed; judgment in No. 204 reversed and remanded to the Circuit Court of Appeals for the Fourth Circuit with directions to dismiss writ of error for want of jurisdiction.

FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 114. Argued January 6, 1916.—Decided February 21, 1916.

A State may not directly and materially hinder the exercise of the constitutional powers of the United States by demanding, in opposition to the will of Congress, that a Federal instrumentality pay a tax for performing its functions.

Mere contracts, however, between it and the United States do not render a private corporation an essential governmental agency and confer freedom from state control.

The Act of August 13, 1894, c. 282, 28 Stat. 279, allowing certain corporations to be accepted as surety does not endow them with power, or create them instrumentalities of the United States, and relieve them from compliance with the laws of, or payment of the lawful taxes in, the States in which they transact their business.

The statute of Pennsylvania of June 28, 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of United States government officials given by surety companies complying with the act of 1894, unconstitutional as an interference with the powers of the Federal Government by taxing an instrumentality thereof.

244 Pa. St. 67, affirmed.

THE facts, which involve the right of a State to tax a foreign corporation doing business within the State on premiums received for bonds of surety required of its officers and others by the United States, are stated in the opinion.

Mr. Charles Markell, Jr., with whom *Mr. Charles F. Patterson* was on the brief, for plaintiff in error.

Mr. William M. Hargest, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

We are asked to reverse a judgment of the Supreme Court of Pennsylvania which denied plaintiff in error's claim that in becoming surety upon bonds required by the United States it acted as a Federal instrumentality and was not subject to taxation on the premiums received. 244 Pa. St. 67.

Incorporated under the laws of Maryland, the Fidelity & Deposit Company is empowered by its charter to act as surety. It was duly licensed to transact business in Pennsylvania. In pursuance of the Act of Congress referred to below, the Attorney General granted it authority to enter into obligations required by laws of the United States.

Contracting within Pennsylvania, the company became surety, during 1909, on bonds in the following matters: "Internal Revenue, customs, United States government officials, United States government contracts and banks for United States deposits, bonds given in Courts of the United States in litigation there pending." Gross premiums thereon amounting to $17,646.86 were collected. Within the same period it also became party to other bonds and received therefor $198,199.19. The State demanded two per centum of such total receipts, basing its claim on the proviso in § 1, Act of Assembly, June 28, 1895, P. L. 408, which declares: "That hereafter the annual tax upon premiums of insurance companies of other States or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding." The amount demanded because of premiums on bonds not authorized or required by the United States, was paid; but liability for $352.92 assessed in respect of those so authorized,

was denied, and to enforce it the present suit was instituted in the Common Pleas Court, Dauphin County.

The Act of Congress entitled "An Act Relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon," approved August 13, 1894 (c. 282, 28 Stat. 279), provided:

SEC. 1. "That whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided*, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

SEC. 2, that "no such company shall do business under the provisions of this Act beyond the limits of the State or Territory under whose laws it was incorporated and in which its principal office is located . . . until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, . . . as its agent, upon whom may be served

all lawful process against such company, . . .” Section 3, that every company before transacting business under the Act shall deposit with the Attorney General of the United States a copy of its charter and a statement showing assets and liabilities, and “if the said Attorney General shall be satisfied that such company has authority under its charter to do the business provided for in this Act, and that it has a paid up capital of not less than $250,000 in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this Act.” Section 4, that quarterly statements shall be filed with the Attorney General, who shall have power to revoke the authority of any company “whenever in his judgment such company is not solvent or is conducting its business in violation of this Act.” Section 5, that “any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States” which has jurisdiction, in the district in which the instrument was made or guaranteed or the principal office of the company is located. Section 6, that “all right to do business under this Act” shall be forfeited upon failure to pay a final judgment against it. Section 7, that a company having executed any instrument under the act shall be estopped to deny its corporate power to execute same. Section 8, that penalties therein prescribed for failure to comply with the provisions of the Act shall be recovered by suit.

The Court of Common Pleas held the tax “is a charge for the privilege of transacting business in the State, measured by the amount of the business done;” there is “nothing in the Act of Congress to support the proposition that the defendant was authorized by it to transact its business in the State of Pennsylvania;” and in executing the specified bonds the surety company “was in no sense an instrumentality of Government.” Judgment was ac-

cordingly rendered for the State; and, on appeal, this was affirmed upon findings and opinion below.

In behalf of plaintiff in error, counsel maintain that the taxing power of the State has been so exercised as to collide with operations of the Federal Government; that under the Act of Congress the surety company became a Federal instrumentality with power to execute bonds within the State and consequently could not be subjected to a privilege tax therefor.

That the challenged tax "is an exaction for the privilege of doing business," seems plain (*Equitable Life Ass. Soc.* v. *Pennsylvania*, 238 U. S. 143); and undoubtedly a State may not directly and materially hinder exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a Federal instrumentality pay a tax for the privilege of performing its functions. *Farmers' Bank* v. *Minnesota*, 232 U. S. 516; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292. But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control. *Baltimore Ship Building Co.* v. *Baltimore*, 195 U. S. 375. Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations contracting under it with the Federal Government shall not be exempt from state regulation and taxation, they must submit thereto. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Van Allen* v. *Assessors*, 3 Wall. 573, 585; Cooley on Taxation, 3d ed., pp. 130, 131.

As revealed by its title, the purpose of the Act of 1894 is "to allow certain corporations to be accepted as surety, etc." It does not undertake to endow any corporation with power, but only to permit those complying with specified conditions to exercise their lawful powers, derived from other sources, by contracting with the Govern-

ment under official approval. "Power to guarantee," required by § 1, is not the same thing as "authority under its charter," referred to in § 3; and we think the clear intent was that existence of the former should be determined by the laws in force at place of contract. Neither circumstances nor language of the act indicate design or necessity to limit application by the several States of a well-established system of licensing and taxing bonding companies not incorporated under their own statutes. Plaintiff in error's right to carry on business in Pennsylvania depended upon compliance with its laws.

We find no error in the judgment of the court below and it is

Affirmed.

SEABOARD AIR LINE RAILWAY COMPANY *v.* RAILROAD COMMISSION OF GEORGIA.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 170. Argued January 13, 14, 1916.—Decided February 21, 1916.

It is within the power of a State, acting through an administrative board, to require railroad companies to make physical track connections where public necessity exists therefor.

In determining whether such public necessity exists, just regard should be given on the one side to probably resulting advantages, and, on the other side, to the necessary expenses to be incurred.

A finding of public necessity for a physical track connection cannot be supported by the mere declaration of the commission; there must be sufficient evidence to support it.

In this case, *held* that the finding of the Railroad Commission of Georgia that public necessity existed for a physical connection of tracks of two railroads at a point in the State, was, as held by both courts below, supported by the evidence, and the order of the Com-

mission made pursuant to power conferred by § 2664, Georgia Code, was fully justified.

213 Fed. Rep. 27, affirmed.

THE facts, which involve the validity of an order requiring switch connections made by the Railroad Commission of Georgia, are stated in the opinion.

Mr. Edgar Watkins and *Mr. W. G. Loving*, with whom *Mr. W. Carroll Latimer* was on the brief, for appellant:

The physical connection sought would accommodate a terminal service only and its principal purpose is the accommodation of interstate transportation by furnishing a terminal service therefor.

Neither the practicability nor reasonableness of the physical connection adopted by the trial court was ever considered or determined by the Commission.

The order takes property of appellant without compensation and for the benefit of its competitor and a few individuals and is arbitrary, unreasonable and without substantial evidence to support it.

The connection which met the approval of the trial judge was never considered by the Commission, and appellant had no hearing as to its practicability or reasonableness.

Congress having acted upon the subject-matter, the state Railroad Commission had no jurisdiction to order the physical connection.

The order serves no public purpose and takes the property of appellant without compensation and for the benefit of private persons.

In support of these contentions, see *Atlantic Coast Line* v. *North Car. Com.*, 206 U. S. 1; *Blakely So. Ry.* v. *Atlantic Coast Line*, 26 I. C. C. 344, 350; *Central Stock Yards* v. *Louis. & Nash. R. R.*, 192 U. S. 568; *Chicago, &c. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 425; *Cole* v.

Cent. R. R., 86 Georgia, 251; Georgia Statutes for Switch and Physical Connections; *Int. Com. Comm.* v. *Atchison &c. Ry.*, 234 U. S. 294; *Ill. Cent. R. R.* v. *La. R. R. Com.*, 236 U. S. 157; *Louis. & Nash. R. R.* v. *Higdon*, 234 U. S. 592; *Louis. & Nash. R. R.* v. *Finn*, 235 U. S. 601; *McNeil* v. *Southern Ry.*, 202 U. S. 543; *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510; *Ga. Railway Com.* v. *Louis. & Nash. R. R.*, 140 Georgia, 817; *St. Louis, I. M. & S. Ry.* v. *Edwards*, 227 U. S. 265; *St. Louis S. & P. R.* v. *Peoria &c. Ry.*, 26 I. C. C. Rep. 226; *Southern Ry.* v. *Reid*, 222 U. S. 424; *State* v. *Wrightsville &c. R. R.*, 104 Georgia, 437; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 426; *United States* v. *Union Stock Yards*, 226 U. S. 286; *Wadley So. Ry.* v. *State*, 137 Georgia, 497; *S. C.*, 235 U. S. 651; *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287.

Mr. James K. Hines for appellee.

Mr. Justice McReynolds delivered the opinion of the court.

After hearing the interested parties, the Railroad Commission of Georgia concluded that making and maintaining physical connection at Lawrenceville, Georgia (a manufacturing town with two thousand inhabitants), between Lawrenceville Branch Railroad and Seaboard Air Line Railway would be practicable and to the public interest; and accordingly passed an order that within four months the roads should provide and maintain one, together with sufficient interchange tracks to care for traffic moving between them. No definite point for the connection was prescribed; opinion was expressed that expenses should be borne equally by the two companies; and they were directed to report their action within thirty days.

Appellant brought this proceeding in the United States District Court, Northern District of Georgia, alleging the order was null and void and asking that its enforcement be enjoined. That court heard additional evidence and upon the whole record concluded the challenged order was not unreasonable and the commission was fully justified in making it. 206 Fed. Rep. 181. Injunction was accordingly denied and suit dismissed, and this action was affirmed by the Circuit Court of Appeals. 213 Fed. Rep. 27.

Section 2664, Georgia Code, 1910, gives the railroad commission "power and authority, when in its judgment practicable and to the interest of the public, to order and compel the making and operation of physical connection between lines of railroad crossing or intersecting each other, on entering the same incorporated town or city in this State." *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651.

It is within the power of a State, acting through an administrative body, to require railroad companies to make track connections where the established facts show public necessity therefor, just regard being given to advantages which will probably result on one side and necessary expenses to be incurred on the other. The facts being established, the question then presented is whether as matter of law there is sufficient evidence to support a finding of public necessity—the mere declaration of a commission is not conclusive. *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, 295, 296; *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *Great Northern Ry.* v. *Minnesota*, 238 U. S. 340, 345.

The state commission and both courts were of opinion that the facts sufficed to show public necessity for the connection in question and that it could be constructed and maintained without unreasonable expenditure. The only substantial question before us is whether such find-

ing is plainly erroneous because the evidence is insufficient to support it; and, having examined the record, we are unable to say the facts disclosed do not give the essential support. The judgment of the court below is accordingly

Affirmed.

BUTLER *v.* PERRY, SHERIFF OF COLUMBIA COUNTY, FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 182. Submitted January 14, 1916.—Decided February 21, 1916.

The term involuntary servitude, as used in the Thirteenth Amendment, was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like results, and not to interdict enforcement of duties owed by individuals to the State.

The great object of the Thirteenth Amendment was liberty under protection of effective government and not destruction of the latter by depriving it of those essential powers which had always been properly exercised before its adoption.

The Fourteenth Amendment was intended to recognize and protect fundamental objects long recognized under the common law system.

Ancient usage and unanimity of judicial opinion justify the conclusion that, unless restrained by constitutional limitations, a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable period on public roads near his residence without direct compensation.

A reasonable amount of work on public roads near his residence is a part of the duty owed by able-bodied men to the public; and a requirement by a State to that effect does not amount to imposition of involuntary servitude otherwise than as a punishment for crime within the prohibition of the Thirteenth Amendment; nor does the enforcement of such requirement deprive persons of their liberty and property without due process of law in violation of the Fourteenth Amendment.

The statute of Florida requiring every able-bodied man within its jurisdiction to work during each year for six ten hour days on public roads within the county of his residence, and imposing penalties for willful failure so to do, is not unconstitutional as contrary to the Thirteenth Amendment or to the due process provision of the Fourteenth Amendment.

67 Florida, 405, affirmed.

THE facts, which involve the constitutionality under the Thirteenth and Fourteenth Amendments of a statute of Georgia requiring able-bodied men to do a certain amount of work on public roads, are stated in the opinion.

Mr. Charles C. Howell, for plaintiff in error.

Mr. Thomas F. West, Attorney General of the State of Florida, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Chapter 6537, Laws of Florida (Acts of 1913, pp. 469, 474, 475), provides:

"SEC. 10. Every able-bodied male person over the age of twenty-one years, and under the age of forty-five years, residing in said county for thirty days or more continuously next prior to the date of making of the list by the Board of County Commissioners, or the date of the summons or notice to work, shall be subject, liable and required to work on the roads and bridges of the several counties for six days of not less than ten hours each in each year when summoned so to do, as herein provided; that such persons so subject to road duty may perform such services by an able-bodied substitute over the age of eighteen years, or in lieu thereof may pay to the road overseer on or before the day he is called upon to render such service the sum of three dollars, and such overseer shall turn into the county treasury of his county any and all moneys so paid to him, the same to be placed to the

credit of the road and bridge fund and subject to the order of the Board of County Commissioners for road and bridge purposes; . . .

"SEC. 12. Any person or persons not exempt as aforesaid who shall fail to work on public roads of the several counties when required to do so, or to provide a substitute as herein provided, and shall neglect or refuse to make payment for the same, as hereinbefore provided, shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned in the county jail for not longer than thirty days."

Plaintiff in error was convicted in the County Judge's Court, Columbia County, upon a charge of failing to work on a road, and sentenced to jail for thirty days. The Circuit Court granted a writ of *habeas corpus;* he was heard, remanded to the custody of the sheriff, and then released under bond. The Supreme Court of the State affirmed the action of the Circuit Court (67 Florida, 405), and the cause is here upon writ of error.

It is insisted that §§ 10 and 12, *supra*, are invalid because they undertake to impose involuntary servitude not as a punishment for crime, contrary to the Thirteenth Amendment to the Federal Constitution; and also because their enforcement would deprive plaintiff of his liberty and property without due process of law, in violation of the Fourteenth Amendment.

In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus declared in Blackstone's Commentaries, Book 1, page 357:

'Every parish is bound of common right to keep the

highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, With respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted.'

The *trinoda necessitas* was an obligation falling on all freemen or at least on all free householders. Vinogradoff, English Society in the Eleventh Century, p. 82.

From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor. Elliott on Roads and Streets, §§ 479, 480; Dillon on Municipal Corporations, 5th Edition, § 1407, p. 2459, note; Cooley, Constitutional Limitations, 7th Edition, p. 736; *In re Dassler*, 35 Kansas, 678; *State* v. *Wheeler*, 141 N. Car. 773, S. Car., 5 L. R. A. (N. S.) 1139, note; *Dennis* v. *Simon*, 51 Ohio St. 233; *State* v. *Rayburn*, 2 Okla. Cr. Rep. 413; *Sawyer* v. *Alton*, 4 Illinois, 127; *State* v. *Commissioners of Halifax*, 15 No. Car. 345. In 1889 the statutes of twenty-seven States provided for such labor on public roads. Young's Recent Road Legislation.

The Ordinance of 1787 for the government of the Northwest Territory declares: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted."

In 1792 the territorial legislative body passed an act providing: "That every male inhabitant of sixteen years of age and upwards on being duly warned to work on the highways by the supervisor in the township to which such inhabitant may belong shall repair to the place and at the time by the said supervisor appointed with such utensils and tools as may be ordered him wherewith he is to labour and there abide and obey the direction of such supervisor during the day in opening and repairing the highway." (Sec. 5, Chapter IV, Laws passed from July to December, 1792, Laws of the Territory Northwest of the Ohio, 1788–1798.) An act of the General Assembly of the Territory passed in 1799, declared: "That all male persons of the age of twenty-one years, and not exceeding fifty, who have resided thirty days in any township of any county within this territory, who are not a township charge, shall over and above the rate of assessment hereinafter mentioned, be liable, yearly and every year, to do and perform two days work on the public roads, under the direction of the supervisor within whose limits they shall be respectively residents." (Sec. 10, Chapter 28 of Northwest Territory Acts, 1799.)

By their several constitutions the States within the limits of the Northwest Territory prohibited involuntary servitude substantially in the language of the 1787 Ordinance, and with the possible exception of Wisconsin, all of them early enacted and long enforced laws requiring labor upon public roads.

Utilizing the language of the Ordinance of 1787, the Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.

It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy* v. *Ferguson*, 163 U. S. 537, 542; *Robertson* v. *Baldwin*, 165 U. S. 275, 282; *Clyatt* v. *United States*, 197 U. S. 207; *Bailey* v. *Alabama*, 219 U. S. 219.

There is no merit in the claim that a man's labor is property, the taking of which without compensation by the State for building and maintenance of public roads, violates the due process clause of the Fourteenth Amendment. That Amendment was intended to preserve and protect fundamental rights long recognized under the common law system. *Slaughter House Cases, supra; Jacobson* v. *Massachusetts*, 197 U. S. 11; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Kelly* v. *Pittsburg*, 104 U. S. 78, 80; *Davidson* v. *New Orleans*, 96 U. S. 97. Conceding for some purposes labor must be considered as property, it is evident from what already has been said that to require work on the public roads has never been regarded as a deprivation of either liberty or property.

The circumstances of the present case indicate no failure to observe due process of law in the exercise of the State's undoubted power. Ample notice appears to have been given and disregarded. There was an orderly trial and conviction before a duly constituted tribunal for a plainly defined statutory offense, followed by a sentence not alleged to be unreasonable.

We find no error in the judgment of the court below, and it is

Affirmed.

PHILADELPHIA AND READING RAILWAY COMPANY *v.* UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, AND ALLENTOWN PORTLAND CEMENT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 440. Argued October 18, 19, 1915.—Decided February 28, 1916.

Where, as in this case, no undue discrimination against the shipper or the locality of its plant is found, and the community declared to be prejudiced by the established conditions has not complained and is not a party to the proceeding, and the rate complained of is intrinsically reasonable, the mere fact that other carriers have adopted a lower schedule from the shipper's district to points other than the one designated, affords no foundation for a finding by the Interstate Commerce Commission that such rate is unreasonable and erroneous as matter of law.

As the order of the Commission in this case is not supported by the ascertained facts its enforcement should be enjoined.

219 Fed. Rep. 988, reversed.

THE facts, which involve the validity of an order of the Interstate Commerce Commission relating to railway rates, are stated in the opinion.

Mr. Henry S. Drinker, Jr., for appellant.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. William A. Glasgow, Jr., for respondent Allentown Cement Company.

Mr. Assistant Attorney General Underwood and *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, for the United States submitted:

The practice complained of subjected Jersey City to undue and unreasonable prejudice and disadvantage. Section 3 of the Act to Regulate Commerce forbids discrimination of any kind whatsoever. *Houston & Tex. Ry.* v. *United States*, 234 U. S. 342, 356; *Southern Ry.* v. *United States*, 204 Fed. Rep. 465; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 118 Fed. Rep. 613.

It is within the power of the Commission to protect the consuming point from discrimination as well as the locality where the traffic originates. *Tex. & Pac. Ry.* v. *Int. Com. Comm.*, 162 U. S. 184, 220.

What is undue or unreasonable preference or advantage is a question not of law but of fact. *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Tex. & Pac. Ry.* v. *United States*, 162 U. S. 197, 219; *Int. Com. Comm.* v. *Alabama Midland Ry.*, 168 U. S. 144, 170.

The determination of this question of fact is for the Commission, and its findings are conclusive. *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320.

This case having been submitted on bill and answer, the preferences and discrimination alleged in the answer of the Commission must be taken as true. *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 475; *Int. Com. Comm.* v. *Chi. & Alton R. R.*, 215 U. S. 479; *Int. Com. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88.

Appellant having voluntarily, in its traffic agreements with the other carriers, established the same relative rates from all points in the Lehigh district to consuming points other than Jersey City, cannot, if conditions are the same, arbitrarily decline to make the same arrangement with respect to Jersey City. *Phila. & Reading Ry.* v. *United States*, 219 Fed. Rep. 988; *Darling* v. *Balt. & Ohio R. R.*, 15 I. C. C. 79, 87; *Spokane* v. *Nor. Pac. Ry.*, 21 I. C. C. 400, 424.

The Commission, after consideration of evidence, not set out in the record but adduced at the hearing before

it, found, it must be presumed, that conditions existing at Jersey City were not so different from those existing at other consuming points as to justify different treatment. There is nothing in the record to show the absence of substantial evidence supporting these findings of fact, so they are "conclusively correct in case of judicial review." *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This appeal brings up a final decree of the United States District Court, Eastern District of Pennsylvania, which dismissed the railway's original bill presented to secure annulment of an order by the Interstate Commerce Commission commanding it and other carriers to desist from subjecting Jersey City to undue prejudice and disadvantage in respect of rates on Portland cement from the "Lehigh District" in Pennsylvania. 219 Fed. Rep. 988.

Appellant maintains that when considered in connection with its report, the Commission's order is plainly erroneous as matter of law because wholly unsupported by the ascertained facts. *Interstate Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185.

In November, 1912, the Allentown Portland Cement Company filed a petition before the Interstate Commerce Commission against the Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and Pennsylvania Railroad Company, wherein it alleged the Philadelphia & Reading operates the only line reaching its plant at Evansville, Pa., and in connection with other defendants transports cement therefrom to many points, including Jersey City;

that the published rate of $1.35 per ton charged and collected for transportation to the latter place is unlawful and forbidden by §§ 1 and 3 of the Act to Regulate Commerce. It prayed for "an order declaring the rates aforesaid to be unjust and unreasonable and that the same discriminate against complainant and the locality wherein is located its plant or factory aforesaid, and that the Commission will also enter an order fixing the reasonable and just rates for the transportation of Portland Cement from its factory or plant at Evansville, over the lines of the defendants." After hearing, a report and order were made by the Commission; upon rehearing the original findings were approved in an additional report and a supplemental order, not substantially different from the first one, was passed. The material portions of these reports follow:

"The case involves the question of the reasonableness and justness of defendants' rate for the transportation of cement in carloads from Evansville, Pa., to Jersey City, N. J. Evansville is reached only by the Philadelphia & Reading Railway. That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from the Philadelphia & Reading at Allentown also serve other mills in the same general vicinity as Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district." 31 I. C. C. 277.

"Evansville is situated in the Lehigh district and is one of numerous cement mills in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadel-

phia & Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct or by short lines of railway which connect with those carriers at distances of from 1 to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading the rate to Jersey City from these competing mills on other lines is 80 cents. . . . On shipments to Jersey City for trans-shipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with the other mills is maintained on traffic to Philadelphia, Baltimore, New York City, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

"The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth street totaling less than the $1.40 rate to New York proper plus the trucking charge to the same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third street, which is the greatest cement consuming district. North of Ninetieth street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant can not sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate."

"It can not be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the

establishment of the 80-cent rate from these other mills, as it can not participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist." 27 I. C. C. 448.

Purporting to base its action on the foregoing findings, the Commission directed:

"That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before October 1, 1914, to cease and desist from said undue and unreasonable prejudices and disadvantages."

"That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish on or before October 1, 1914, upon statutory notice to the Interstate Commerce Commission and to the general public by filing and posting in the man-

ner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said October 1, 1914, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages."

Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; and there was no positive finding touching the reasonableness—intrinsic or relative—of the 80-cent schedule from "Lehigh District" adopted by the remaining carriers.

In their brief here, counsel for the Commission say:

"The Commission did not pass upon the reasonableness of either rate [to Jersey City—80 cents or $1.35]. It struck at the discrimination and the cause of it. It said, in effect, to these five carriers that as they treated the Lehigh cement district as one point of origin and made a *relative adjustment of rates* on cement to all the principal consuming points competing with Jersey City, they must make the same adjustment of the rates to Jersey City on this commodity; that they might make the rate any sum which they might choose to initiate, but that it must be the same as the rate from every mill in the district to Jersey City. . . ."

"If, as to all other consuming localities, they [the carriers] are giving the relative adjustment of rates on cement from cement mills in the Lehigh district, and refusing this adjustment to one consuming locality, they are prejudicing that locality. . . ."

"The establishment of joint rates is provided for in section 6 of the act to regulate commerce. Such rates

are made by agreement between the participating carriers and cannot be filed or published without such agreement. . . ."

"The appellant has no individual rate which covers the cement traffic from Evansville to Jersey City; the traffic moves on a joint rate. The cement traffic from other mills to Jersey City and to other principal consuming points also moves on joint rates. The Philadelphia & Reading is a party to many of these rates. It is also a party to the joint rate from Evansville to Jersey City. As a participating carrier in these rates it is responsible for the violation of the act described in the order."

We must assume the Jersey City rate of $1.35 is intrinsically reasonable and non-discriminatory in relation to those accorded other consuming points; and, plainly, if this were put in by all carriers, the Commission's order would be complied with and the supposed discrimination disappear. It must be taken as true that no rate above what all might lawfully establish is being demanded by any carrier; and, with one exception, they are paid forty per cent. less than that amount. If a universal rate of $1.35 could not justly be complained of by the locality, certainly *it* is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to "any undue or unreasonable prejudice or disadvantage."

As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined. The decree below is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed.

RAST, TAX COLLECTOR FOR DUVAL COUNTY, FLORIDA, *v.* VAN DEMAN & LEWIS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 41. Argued October 29, November 1, 2, 1915.—Decided March 6, 1916.

In a suit brought to restrain the enforcement of the statute of Florida of 1913, imposing special license taxes on merchants using profit sharing coupons and trading stamps on the ground that it violates the contract and the commerce clauses of, and the due process and equal protection provisions of the Fourteenth Amendment to, the Federal Constitution, and in which the District Court, under Judicial Code, § 226, granted a preliminary injunction holding that the statute violated the Fourteenth Amendment without stating on which provision it rested its decision or determining whether the statute violated other provisions of the Constitution, this court, on appeal from the order of injunction reversed and remanded with instructions to dismiss the bill as the statute does not offend any constitutional provisions under consideration, and *held* that:

As the bill shows that the conditions of complainant's business and property engaged therein are such that enforcement of the statute would produce irreparable injury it furnishes ground for equitable relief.

On this appeal this court can pass on the constitutionality of the statute on all of the grounds submitted for consideration.

A classification based on differences between a business using, and one not using, such coupons and stamps is not so arbitrary as to deny equal protection of the law.

A distinction in legislation does not deny equal protection of the laws if any state of facts can be conceived that will sustain it; and, even though such facts or their effect may be disputed, courts cannot arbitrate such differences of opinion.

It is for the legislature to discern and correct evils, not only of definite injury, but also such as are obstacles to greater public welfare if within legislative authority, as is the use of such coupons and stamps.

Quære, whether a statute relating to coupons and stamps re-

deemable exclusively in cash and credit on purchase is objectionable, the statute and all the schemes under consideration in this case involving other methods of redemption.

The use of such coupons and stamps in connection with retail sales to individual purchasers and consumers and not designed to be used by the manufacturer from another State to the State of distribution, are not transactions of interstate commerce, and regulations of the use of such coupons and sales otherwise legal do not interfere with, nor are they a burden, on interstate commerce.

Regulation by a State of the use of such coupons and stamps in connection with sales of tobacco is not prohibited by Rev. Stat., § 3394, as amended in 1897 and 1902; that section does not attempt to protect and enforce permission as to retail sales within the States.

Regulation of retail sales within the State does not in this case amount to an attempt to control transportation of the packages into the State from other States.

The statute is not unconstitutional as impairing obligation of contracts as it must be construed as having prospective operation, and as not affecting sales completed before its enactment.

If a business is subject to regulation by the State and the imposition of privilege taxes for carrying it on, contracts made in its conduct are also subject to such regulation.

There are many restrictions upon liberty of contract and business that do not amount to deprivation of liberty and property without due process of law.

In conducting retail business the use of such coupons and stamps is not advertising pure and simple. The latter is merely identification and description of the article sold, apprising of quality and space, while the former relies upon something other than the article itself.

Whether the use of such coupons and stamps can or cannot be called a lottery, it is still within the power of the legislature to consider it as having similar evils; and the regulation thereof by the legislature is not to be impeached and overruled by the courts on account of difference of opinion in regard to the conclusion reached.

The recognized rule that legislative opinion may not impose judicial opinion as to what are fundamental rights, does not determine supremacy in any given instance; but the power of the legislature to regulate conduct and contracts upon its conception of the public welfare is only subject to review by the courts when the legislation is unreasonable or purely arbitrary.

Even if the taxes imposed by the statute are prohibitory, the

right to carry on business by using such coupons and stamps is not so protected by the Federal Constitution as to render such a tax a violation of the due process provision of the Fourteenth Amendment.

The statute is not open to objection as depriving of liberty and property without due process of law on account of severity of its penalties intimidating against testing its legality. *Ex parte Young*, 209 U. S. 123, distinguished.

214 Fed. Rep. 847, reversed.

A STATUTE of Florida approved June 5, 1913 (Vol. 1, p. 3), imposing licenses and other taxes, provides that merchants, druggists and storekeepers shall pay a license tax upon the cash value of the "stock of merchandise" of $3 for the first $1000 or fraction thereof, and $1.50 for each additional $1000 or fraction thereof. The tax upon wholesale dealers is $1.50 upon each $1000. The statute has this proviso: § 35, p. 35.

"Provided, further, That each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a State license tax of Five Hundred ($500.00) dollars and a County license tax of two hundred and fifty ($250.00) dollars in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate State and County license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license prescribed in this section shall be in addition to other licenses prescribed by this Act. Any

person violating any of the provisions of this section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand ($1000) dollars or by imprisonment in the county jail not exceeding six months.

"Mercantile Agencies: Shall pay a license tax of one hundred ($100.00) dollars in each county in which an office is established.

"Merchants using trading stamps, shall pay a license tax of two hundred and fifty ($250.00) dollars for each place of business where they use such stamps.

"Merchant tailors shall pay a license tax of ten ($10.00) dollars for each place of business."

This suit was instituted by appellees (Florida merchants) against appellant Rast as tax collector of Duval County, Florida, and the tax collectors of each county in the State, the different State's attorneys, county solicitors and prosecuting attorneys of the circuits and counties of Florida. The purpose of the suit was to restrain those officers from proceeding under the statute or enforcing it. A preliminary and perpetual injunction was prayed and that the act be declared unconstitutional, illegal and void.

The bill is very elaborate and we select from its repetitions and condense the following: It alleges the various businesses in which the complainants are engaged. The Van Deman & Lewis Company is a Florida corporation and a wholesale grocer, doing business as such and selling groceries in certain counties in the State; Harkisheimer Company is also a Florida corporation and is a retail grocer; J. S. Pinkussohn Cigar Company is a corporation organized under the laws of South Carolina and is a wholesale and retail merchant buying and selling cigars and other tobacco products in the cities of Jacksonville and Pensacola, Florida. With these complainants were joined others, corporations and individuals, doing business in Florida.

It is alleged that complainants and each of them in the conduct of their business offer for sale and deal in various and numerous articles of merchandise manufactured and produced in other States than Florida by persons and corporations in those States and shipped into Florida to be sold therein, and who, for the purpose of advertising their businesses and increasing their sales, enclose in the packages in which the merchandise is put up for market and sale coupons, slips, certificates and other profit-sharing discount or premium tokens. The articles and the persons and companies producing them are enumerated.

The manner or method of disposing of and redeeming and taking up such coupons, etc., is alleged to be that the same are enclosed in packages or the wrappers thereof, or are a part of the wrappers, the packages are put into boxes, cases or other receptacles or enclosures and shipped by the manufacturer or producer from his place of business outside of Florida to the merchants in Florida, generally to a wholesale merchant or jobber, and are received by such in Florida and sold to the retail merchants in that State. The retail merchant sells them to his customers. When the latter have accumulated a sufficient number of the coupons, etc., to entitle them to receive a premium or article or payment therefor according to some list, catalogue or rule promulgated by the manufacturer, producer or original shipper, they send such coupons, etc., to such manufacturer, producer or original shipper, or in some instances, to a company or agency in some State other than Florida, where they are redeemed or paid or the articles which the purchasers have selected are sent to them in consideration of such coupons, etc., or for the same and a postage stamp or stamps or a small sum of money in addition thereto. And this in accordance with the contract, agreement or sale made to the purchasers by the manufacturer, shipper or producer outside of the

State. And it is alleged that the transactions so detailed, the manufacture without the State and shipment to wholesale merchants within the State, the sale by the latter to retail merchants and by the latter again to customers, constitute interstate commerce.

That the form of the coupons, etc., varies and when its identity is secured as prescribed it is evidence that each purchaser of a package has bought a definite part of some article, to be selected by him or her from a certain list, the list showing a number of valuable articles which can be paid for by a certain number of the tokens and a two-cent stamp.

In another case there is an accumulation of the tokens which are to be sent to the redemption or coupon agency or corporation and exchanged for a valuable article of merchandise to be selected by the purchaser from a list or catalogue furnished him.

Another form of coupons, etc., is where each of them is good for a certain value, for instance, one-half cent in presents or premiums, the coupons being sent from the State of Florida to another State. There are also other forms in which the coupons or tokens are to be redeemed, paid for or used in the purchase of other articles of merchandise or in the accumulation of premiums or the like. All of the articles are known and largely used as legitimate articles of commerce and the transactions detailed are interstate commerce.

That divers forms of coupons, etc., in connection with the sale of merchandise are used by the merchants of the State substantially in similar form mentioned above and the payment or redemption is made by the Florida merchant in Florida, sometimes by the delivery of some valuable article of merchandise; sometimes by the payment of cash or the allowance of credit on account of purchases in the nature of a discount or for or on account of a certain amount having been purchased of the merchant by the

customer. The tokens are sometimes in the form of a cash register slip or memorandum.

That the methods detailed are a form of advertising and the use of such coupons, etc., induces purchasers to trade more largely with and to make more of their purchases from complainants on account of the additional inducement of such coupons, etc.; that they increase the businesses of complainants and their profits and enable them to carry and sell stocks of goods covering the various articles of merchandise, and are of great importance and value to complainants in their several businesses; and if they are prevented from using them their businesses will be decreased to the amount of many thousands of dollars.

That at the time of the passage of the statute complainants had on hand large amounts and quantities of goods and if they are prevented from selling them in the manner detailed they will be subjected to great loss and damage, will be embarrassed and injured in their businesses and the value of their property destroyed or greatly lessened.

That the transactions and methods give an additional value to purchasers and they are substantially benefited thereby. That there is no element of gambling or chance in the transactions and nothing in them or their methods prejudicial to the public health, safety, morals or welfare.

That if there is a cessation of the transactions purchasers and customers who have received tokens but have not accumulated a sufficient number of them will be unable to have the same redeemed or paid or secure articles therewith. That about 500 merchants are similarly affected with complainants.

That certificates or tokens commonly called trading stamps and so designated in the statute are substantially like some of the tokens hereinbefore mentioned and

described and when delivered by retail merchants with the various articles sold to purchasers such purchasers are entitled to purchase or receive various valuable articles of merchandise, according to a list or catalogue, upon the presentation of the stamps to some person or company that has issued the trading stamps and that redeems them according to the provisions of such list or catalogue.

That under the statute every person, firm or corporation offering with merchandise any coupon, profit-sharing certificate or other evidence of indebtedness or liability redeemable in premiums is not only liable to pay the license tax for himself or itself but to pay such tax for every other person, firm or corporation who may redeem any such coupon, etc.

That such taxes are unreasonable, enormous and prohibitive on account of the number of articles sold, and by reason of the provision requiring complainants and each and every other person in like situation to pay the license tax to the State, and it is alleged with much circumstance that, from their number and the number of the articles that each sells, each and every person would be required to pay for license tax to the State and for one county or one place of business alone $15,000 per year or one-half that amount for six months or less time.

That as a result of the statute, if the tax be paid for only 100 persons or persons, firms or corporations, it would amount to $75,000 per annum; if for 1000 persons, firms or corporations in Florida for one place of business, it would amount to $750,000, and so on as to any number to be paid by and for each and every of such manufacturer, producer or shipper.

That such coupons, etc., enclosed in packages of tobacco and so delivered are authorized and rendered lawful by section 3394 of the Revised Statutes of the United

States as amended by § 10 of the act of July 24, 1897, 30 Stat. 151, 206, c. 11, and by § 2 of the act of July 1, 1902, 32 Stat. 714, 715, c. 1371.

That the provision of § 35 (the provision quoted above) of the Florida statute and all provisions and enactments for its enforcement are in violation of the Constitution of the United States in that they violate (1) the commerce clause, (2) the due process clause of the Fourteenth Amendment, and (3) the equal protection clause of that amendment. There are many specifications of the particulars and it is alleged: (1) The statute discriminates between merchants in similar lines of business; (2) between merchants who advertise in a certain manner and those who advertise in another manner. (3) The taxes are not upon the business or occupation of complainants but upon the mere incidents of the business and are an unreasonable and illegal interference with the method and manner of conducting the business. (4) The taxes are unreasonable, arbitrary, oppressive, discriminatory and prohibitory for the reasons already detailed and are far in excess of the amounts of taxes or licenses fixed or imposed when other methods of advertising or inducing custom are used and will prevent complainants from carrying on their legitimate business. (5) They are not productive of revenue, are in excess of the profits of the businesses, and are in fact prohibitory. (6) That the methods employed by complainants in no wise affect the public health, morals or welfare, and the imposition of the taxes is in no way a legitimate or lawful exercise of the police power of the State. (7) That the fines are so onerous, drastic, excessive and enormous as to deter complainants in going on and doing business as they have heretofore done and testing the validity of the statute in a court of law.

That by the statute and in § 59 thereof a violation of its provisions is made a misdemeanor and it is provided

in § 35 that for failure to pay any of the license taxes any person, whether acting for himself or as agent of another, may be imprisoned in the county jail, not exceeding six months.

It is further alleged that the statute impairs the obligations of the contracts entered into between complainants and their customers, in violation of clause 1, § 10, Article I, of the Constitution of the United States.

That the officers of the State threaten to enforce the statute and that the State's attorneys, county solicitors and prosecuting attorneys of the several circuits and counties of the State are respectively empowered and authorized to prosecute in the several courts of the State and such officers are threatening to prosecute divers of the complainants, and it is alleged that a multitude of prosecutions will be instituted, with seizures, sales and injury of property if a temporary restraining order be not granted. There is a prayer for such order and for a perpetual injunction.

A restraining order was issued. The defendants appeared specially and filed motions to dismiss the suit and as grounds thereof denied the allegations and implications of the bill as to the various grounds of infringement of the Constitution of the United States charged against the statute, and set up that complainants had a complete and adequate remedy at law. That the bill sought a restraint of the enforcement of a criminal statute of the State and to enjoin an alleged threatened seizure of property in the enforcement of the alleged illegal tax and the enforcement of the collection of a tax imposed by a statute of the State of a general and public nature

A motion was made for an interlocutory injunction, hearing upon which was referred to three judges Upon the hearing the injunction was ordered (214 Fed. Rep. 827), to review which this appeal has been prosecuted.

Mr. Thomas F. West, Attorney General of the State of Florida, for appellant:

The case presented is not within the cognizance of the equity jurisdiction of the Federal courts.

No ground for equitable interposition is shown to exist as against the tax collectors.

A court of equity has no jurisdiction to restrain the prosecuting officers named, because any action taken by them looking to the enforcement of the provisions of this statute is a criminal proceeding, and to enjoin them actually amounts to enjoining the State from proceeding in its own courts.

A part of the business conducted by the appellees being wholly intrastate, the enforcement of the statute cannot violate the commerce clause of the Federal Constitution.

The statute is not in contravention of the due process provisions of the Fourteenth Amendment to the Federal Constitution.

There is a just basis for the classification made by this statute and it does not deny due process of law.

In support of these contentions, see *Odlin* v. *Woodruff*, 31 Florida, 160; *Florida Packing Co.* v. *Carney*, 49 Florida, 293; *S. C.*, 51 Florida, 190; *Metcalf* v. *Martin*, 54 Florida, 531; *Cruickshank* v. *Bidwell*, 176 U. S. 73; *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Pullman Co.*, 139 U. S. 658; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *Pittsburgh Ry.* v. *Public Works*, 172 U. S. 32; *Arkansas Loan Assn.* v. *Madden*, 175 U. S. 269; *Harrison* v. *Kersey*, 67 Florida, 24; *Bradley* v. *Richmond*, 227 U. S. 477; *Gundlin* v. *Chicago*, 177 U. S. 183; Florida Constitution, Art. V, §§ 5, 37; *Ex parte Nightengale*, 12 Florida, 274; *In re Sawyer*, 124 U. S. 200; *Fitts* v. *McGhee*, 172 U. S. 516; *Ex parte Young*, 209 U. S. 123; *Osborne* v. *Florida*, 164 U. S. 650; *Singer Machine Co.* v. *Brickell*, 233 U. S. 304; *Browning* v. *Waycross*, 233 U. S.

16; *Minnesota Rate Cases*, 230 U. S. 205; *Savage* v. *Jones*, 225 U. S. 501; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Little* v. *Tanner*, 208 Fed. Rep. 605; *State* v. *Pitney*, 140 Pac. Rep. 918; *Lansburg* v. *Dist. of Col.*, 11 App. D. C. 512; *Humes* v. *Ft. Smith*, 93 Fed. Rep. 857; *Wilder* v. *Quebec*, Rap. Jud. Quebec, 25 C. S. 128; *Tap Line Cases*, 234 U. S. 1; *Loewe* v. *Lawlor*, 208 U. S. 274; *Otis* v. *Parker*, 187 U. S. 606; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Lindsley* v. *Natural Carbonic Co.*, 220 U. S. 61; *Commonwealth* v. *Reinecke Coal Co.* (Ky.), 79 S. W. Rep. 287; *Noble State Bank* v. *Haskell*, 219 U. S. 104; Freund, Police Power, § 3; *Atchison &c. R. R.* v. *Mathews*, 174 U. S. 96; *McLean* v. *Arkansas*, 211 U. S. 539; *Ferguson* v. *McDonald*, 66 Florida, 496; *Afro-Am. Assn.* v. *State*, 61 Florida, 85; *Peninsular Ins. Co.* v. *State*, 61 Florida, 376; *Pullman Co.* v. *Knott*, 235 U. S. 23; *Citizens Tel. Co.* v. *Fuller*, 229 U. S. 322; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Metropolis Co.* v. *Chicago*, 228 U. S. 61; *Atl. Coast Line* v. *Goldsboro*, 232 U. S. 548.

Mr. Charles M. Cooper for appellee:

Where a state statute is attacked as unconstitutional because violating the Federal Constitution and also as violating the constitution of the State, a Federal question is presented, the United States court has jurisdiction and may decide all questions involved.

The provisions of § 35 of the statute of Florida, complained of, are unconstitutional, illegal and void; they are contrary to and in violation of the Fourteenth Amendment as there is no just or reasonable classification upon which the license taxes are based.

Such classification has been repeatedly held by the Supreme Court of the United States to be unconstitutional and in violation of the Fourteenth Amendment.

The Supreme Court of Florida holds that such classifica-

tion renders the statute unconstitutional and void under the Constitution of the United States as well as that of Florida.

There is nothing in the use of coupons, profit-sharing certificates, etc., that is prejudicial to public health, safety, morals or welfare or that brings it under the police power of the State or justifies or authorizes its prohibition or suppression directly or by license taxes, and admit that said license taxes are not imposed for purpose of revenue or taxation.

Many decisions of Federal and state courts hold such classification and coupon taxes as involved in this case unconstitutional and void. See cases in highest courts of Massachusetts, California and New York.

The cases decided in the District of Columbia, even if correctly decided, do not sustain the constitutionality of the Florida statutes.

The imposition of such license taxes is in no way a legitimate exercise of any police power of said State.

The decisions of the Supreme Court of Florida establish also that the courts are the final judges of the validity of such legislation and that such provisions as are contained in this statute are invalid under the Constitution of the United States and of the State of Florida.

Frequency of attempts at similar legislation does not sustain its constitutionality.

The provisions of the Florida statute are contrary to and in violation of the commerce clause of the Federal Constitution and as the provisions covering interstate commerce are void, all the coupon license tax provisions are void.

The statute is unconstitutional in that it requires complainants and persons similarly situated to pay the license taxes of other persons, firms or corporations.

The statute attempts to deprive complainants, and all other persons in like situation, of the right to bestow a

gift or give a premium or share of profits of business, in violation of the Fourteenth Amendment.

The provisions of the statute which impose fines so great and imprisonment so severe as are fixed for nonpayment of said license taxes as to intimidate complainants from continuing to do business and testing the validity of said statute in a court of law are unconstitutional.

Unjust and arbitrary discrimination without any basis of reason and denial to complainants of equal protection of the laws contrary to the Fourteenth Amendment is further shown by grossly discriminating penalties which amount to confiscation of the goods complainants have on hand with inserts of coupons, certificates or the like.

The license taxes upon the face thereof are so exorbitant, onerous and unreasonable as to be manifestly prohibitory and void.

The statute is unconstitutional because contrary to the provisions of the Constitution against impairing the obligation of contracts.

In its virtual prohibition of tobacco insert coupons, certificates or the like, the Florida statute is contrary to the statutes of the United States which authorize such insertions.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

It was determined that the bill set forth grounds of equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that the statute, if exerted against complainants and their property, would produce irreparable injury, citing *Ex parte Young*, 209 U. S. 123; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207. We concur in this view.

Passing on the constitutional questions involved, the

court was of opinion that the statute violated the Fourteenth Amendment and considered it unnecessary to decide whether there was an interference with interstate commerce.

It is not entirely clear upon what clause of the Fourteenth Amendment the court rested its judgment. The equality clause was selected for special comment. After stating the limitation upon legislation and the power of classification, the court proceeds to say: "Is there a just basis for the classification attempted in this section [§ 35] of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And if goods are offered for sale with which coupons are given, redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods.

"We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a 'greater burden' than that imposed on others in the same calling and condition."

But the court went farther and declared that "the use of coupons, etc., was an entirely legitimate method of advertising" and that such had been the ruling in state cases which were cited. And excluding the application of cases adduced by defendants to sustain the statute as an exercise of the police power of the State, the court said: "As before pointed out, this coupon business is legitimate, in no way affecting the health or morals of the community."

Though it is not clear, as we have said, certainly not explicit in the opinion of the court, whether it decided the due process clause as well as the equal protection clause of the Fourteenth Amendment was violated by the statute,

we may assume that the violation of both was decided. It may be that the court thought that even though the use of coupons was a legitimate method of advertising and not affecting the health or morals of the community, it was nevertheless within the power of the State to license if the statute were free from discrimination, or it may be that the court considered that the two grounds interlocked and were dependent upon the same reasoning. However, the two grounds may be, indeed must be, taken into consideration as they are submitted for decision.

The ground of discrimination, simply and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chi., Burl. & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare. *Eubank* v. *Richmond*, 226 U. S. 137, 142; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59. And, we repeat, "it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." *Quong*

Wing v. *Kirkendall*, 223 U. S. 59, 62, and the cases cited above.

Of course, an element to be considered is the authority of the legislature over the subject-matter, and this will best be examined in considering the contentions of complainants under the due process clause. Preceding that, however, are the contentions based on the commerce clause and the sanction which the Constitution gives to the integrity of contracts.

First, as pertinent to our discussion, are the specific schemes at which, it is said, the statute is directed, and we adopt complainants' description of them. The first is "where the Florida merchant issues his own coupon, certificate or cash register receipt and himself makes payment or redemption of the same, sometimes by the delivery of some valuable article of merchandise, sometimes by the payment of cash or allowance of credit on account of purchases, being in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer." In a word, it is a case where the Florida merchant issues his own coupons and redeems them.

The second is "where the manufacturer or shipper outside of the State of Florida, in some other State of the Union, inserts such coupons or certificates in packages of his goods which he ships to Florida, and the ultimate purchaser or consumer takes such coupons or certificates from such packages and returns them to such manufacturer or shipper in such State outside of Florida, who gives a premium for them and sends such premium or proceeds of redemption to such ultimate purchaser or consumer in Florida who has forwarded to him such coupons or certificates." The merchandise so shipped into Florida is kept in stock by the merchants of the State and the coupons, etc., are delivered upon the sale of the merchandise to their customers, who have them redeemed in the

manner described. That is, the coupons are redeemed by the person who originally issues them; the coupons, however, to repeat, being delivered by the Florida merchant as a part of the transaction between him and the purchaser from him at retail.

The third is "where the manufacturer or shipper in a State other than Florida inserts in the packages of his goods which he ships to Florida such coupons or certificates which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some company or agency in some State of the United States outside of the State of Florida other than the manufacturer or shipper of the goods, to be redeemed or paid, and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupons or certificates." This differs from the other two cases in that a premium company or agency other than the manufacturer or shipper himself is used for the redemption or payment of the coupons or certificates. But here again the Florida merchant is a factor because it is in completion of the sale by him at retail that the coupons are delivered to the purchasers.

We are careful, by much repetition, to show the difference between the cases, to distinguish between the premium systems, and to show, as urged by counsel, that this case is not concerned with a license tax upon a trading stamp business pure and simple, a license upon companies engaged in such business being provided by another section of the statute.[1]

It is well here to observe, to avoid misunderstanding, that the redemption in the first scheme is "*sometimes by the payment of cash or allowance of credit on account of*

[1] "SEC. 55, p. 51. Trading Stamp Firms: Persons or firms or corporations known as trading stamp companies, shall pay a State license tax of one thousand ($1,000.00) dollars in each county where they transact any business."

purchases, or for or on account of a certain amount having been purchased of the merchant by the customer." We are not concerned with a statute directed solely at such method of redemption or a business so confined. The Florida statute imposes its license tax on coupons, etc., "redeemable in premiums." And therefore, whether any other method of redemption—be it by giving a discount or an allowance of credit simply—would be amenable to objection we express no opinion. In all of the schemes other methods of redemption are used and are attempted to be justified.

With this comment we may say that all of the schemes have a common character—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase, something of value given other than it; and even as to the second and third schemes, the transactions are only executed through the purchase at retail. In other words, they are not designed for or executed through a sale of the original package of importation but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the State and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. All of the schemes have their influence and effect within the State. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the State.

The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce, they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the State nor their disposition in the packages of importation. Of course, there is shipment to Florida merchants but

for the disposition of the merchandise in retail trade. The schemes contemplate such disposition and are executed by it. Detach the importations from the retail sale, consider only the transportation to the State of merchandise in its original package, being sold therein in such package, and there may, indeed, be interstate commerce; but so detached and so considered the importations are left without purpose, the schemes without execution. Indeed, complainants contend for the right not only of importations in the original package containing the coupons but the disposition of the goods and coupons through the retail merchant. This, we repeat, has no protection in the commerce clause.

Nor is the regulation of the statute prohibited by § 3394, Rev. Stat. as amended in 1897 (July 24, c. 11, § 10, 30 Stat. 151, 206) and 1902 (July 1, c. 1371, § 2, 32 Stat. 714, 715). Section 3394 provides for a tax on cigars and cigarettes. By the amendment of 1897 it was forbidden to pack in, attach to or connect with any package of tobacco or cigarettes anything but the wrappers, and it was futher provided that there should not be affixed to, or branded, stamped, marked, written or printed upon the packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward. This provision upset the practice of manufacturers and was attacked on the ground that it was beyond the power of Congress under the Constitution to enact, the prohibited practice being a method of advertising. The provision was sustained. *Felsenhead* v. *United States*, 186 U. S. 126, affirming 103 Fed. Rep. 453. In 1902 the paragraph containing the provision was amended so as to forbid the enclosure or attachment to the packages of "any paper, certificate, or instrument purporting to be or representing a ticket, chance, share or interest in, or dependent upon the event of a lottery,

or any indecent or immoral picture, representation, print or words."

Let it be granted that this provision permitted the enclosure in the package of tobacco of tokens of the character with which this case is concerned. It goes no farther nor does it purport to go farther. It does not attempt to protect and enforce the permission to the retail sales of packages in the State. It might not legally have such effect if attempted; and such attempt will not lightly be inferred. *Savage* v. *Jones*, 225 U. S. 501; *Standard Food Co.* v. *Wright*, 225 U. S. 540. The statute of Florida does not seek to control the interstate transportation of the packages, it controls only their sale in the State through the retail merchant, or, it may be, directly to the individual consumer for the purpose described, and in both cases for the ultimate redemption of the tokens delivered with the sale.

McDermott v. *Wisconsin*, 228 U. S. 115, is not applicable. There Congress, for the effective execution of the Food and Drugs Act, defined what the "package" of commerce should be, and necessarily any law which conflicted with it was void. In the case at bar there is no such definition. There is only permission to insert in the package whatever the manufacturer of tobacco may choose, with a single exception. There is no compulsion of use, and omission to avail of the permission has no effect upon the purpose of Congress in the enactment of the revenue laws which provide for the packing of tobacco products.

The contract clause of the Constitution is also unavailable to complainants. The statute must be held to have prospective operation. Sales completed before its enactment are unaffected by it. We say "sales completed," and by this we mean those in which the right of redemption according to some of the schemes has accrued as distinguished from what is alleged in the bill as "the

understanding and expectation" arising from one or more sales that complainants would continue to sell to such purchasers other articles so that they might be able to accumulate tokens and use them. It cannot be said that there is an obligation to continue sales or an obligation to continue purchases. Besides, as the business is subject to regulation the contracts made in its conduct are subject to such regulation. *Louis. & Nash. R. R.* v. *Mottley*, 219 U. S. 467, and *N. Y. Central R. R.* v. *Gray*, 239 U. S. 583.

Having disposed of the other contentions of complainants, we are brought to a consideration of the question whether the statute of Florida offends the due process clause of the Fourteenth Amendment of the Constitution. In other words, does the statute interfere with the business liberty of complainants? Is it an illegal meddling with a lawful calling and a deprivation of freedom of contract? This is the contention, and it is attempted to be supported by the assertion that the schemes detailed in the bill are but a method of advertising and, as such mere allurements to customers, not detrimental in any way to the public health and morals, nor obstructive of the public welfare; but are a means of enterprise, mere incidents of the businesses of complainants and as beneficial to their customers as to them. And besides that they are but a method of giving discount, practically in some instances a rebate upon the price, and in others an equivalent gift of some article that may attract the choice of the purchaser, the choice being free and the article of definite utility and value.

These contentions have the support of a number of cases. They are opposed by others, not nearly so numerous as the supporting cases but marking a change of opinion. Both sets of cases indicate by the statutes passed upon a persistent legislative effort against the schemes under review or some form of them, beginning in 1880 and

repeated from time to time until the statute in controversy was passed in 1913.[1] In such differences between judicial and legislative opinion where should the choice be? That necessarily depends upon what reasoning judicial opinion was based. We appreciate the seriousness of the situation. Regarding the number of the cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion.

The foundation of all of them is that the schemes detailed are based on an inviolable right, that they are but the exercise of a personal liberty secured by the Constitution of the United States and distinguished from other lawful exercise of business contracts and activity by a method of advertising and lawful inducements to an increased custom and that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts but legislatures may be the best judges and, it may be, the conclusive judges.

This may be illustrated. A lottery of itself is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. All participants in it have an equal chance; there is no admonishing caveat of one against the other. And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from

[1] It is said that 23 States have attempted either to prohibit or to license the selling or use of trading stamps and coupons. And there has been like legislation for the District of Columbia and the Territory of Hawaii.

circumstances, become the source of evil or may have evil tendency. *Murphy* v. *California*, 225 U. S. 623.

But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success.

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a "lottery," may not be called "gaming"; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chic., Burl. & Quincy R. R.* v. *McGuire* and *German Alliance Ins. Co.* v. *Kansas, supra.* And it is not required that we should be sure as to the precise reasons for such judgment or that we should certainly know them

or be convinced of the wisdom of the legislation. *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126, 127. See also *Munn* v. *Illinois*, 94 U. S. 113, 132.

But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*" *Otis* v. *Parker*, 187 U. S. 606, 608, 609.

That case illustrated the reach of the power of government to protect or promote the general welfare. It sustained a provision of the constitution of the State of California which made void all contracts for the sale of the stock of corporations on margin or to be delivered at a future day. The practice had been common, its evil was disputed. It was attempted to be justified by argument very much like those advanced in the case at bar, but this court decided that the legislative judgment was controlling.

Even more pertinent in illustration of the power of the States as unaffected by the Fourteenth Amendment is *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157. A statute of the State was sustained which provided that any one engaged in the manufacture, production or dis-

tribution of any commodity in general use, who should intentionally, for the purpose of destroying the competition of any regular, established dealer, discriminate between different places by selling such commodity at a lower rate in one place than such person charged in another, after equalizing the distance from the point of production, should be guilty of a crime. Freedom of conduct was restricted by the statute which had its incentive in trade advantages. It was the judgment of the legislature that such practice was an impediment to the public welfare. The legislative judgment was sustained against the attack, among others, that the law was an infringement of freedom of conduct and contract.

In *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, the company issued scrip payable in merchandise only from its store as an advance of monthly wages in payment of labor performed. A statute of the State (West Virginia) prohibited the issue of any order for the payment of labor unless it was redeemable in money. The statute was assailed on the ground that it interfered with the freedom of contract. It will be observed that there was a consideration for the order payable in merchandise; it was a payment in advance, and hence it was asserted that the statute was an injury to the employees and employers. There were elements in the transactions of apparent advantage to both and it would seem to have been within the liberty of both to contract upon an estimate of the value of that advantage. It was deemed an evil by the legislature and this court sustained its judgment.

In *Erie R. R.* v. *Williams*, 233 U. S. 685, a law of the State of New York required railroad companies to pay their employés semi-monthly and prohibited them from making contracts which should vary the time of payment. The law was sustained mainly upon the ground that it was an amendment of the charter of the corporation, but the extent of the police power was adverted to and the com-

petency of the legislature exercising that power to enact the legislation. The incentive of the legislation was the benefit which accrued to the employees by the period of payment. The public welfare was deemed to be promoted by it.

Other cases might be cited and, it may be, of more pertinent application, which, from their number and instances, would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts and in the exercise of the power to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary.

Complainants allege that the license tax which the statute imposes is of prohibitory character and assert that they are exercising inviolable rights and privileges which the excess of the tax prevents in violation of the Fourteenth Amendment; they contend that hence the statute is invalid.

It is not certain from the allegations of the bill that the tax is of the asserted character, but granting it to be so we have shown that the business schemes described in the bill are not protected from regulation or prohibition by the Constitution of the United States. *Lawton* v. *Steele*, 152 U. S. 133; *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; see also *Dobbins* v. *Los Angeles*, 195 U. S. 223, 238; *Murphy* v. *California*, 225 U. S. 623; *Postal Telegraph Co.* v. *Charleston*, 153 U. S. 692, 699; *McCray* v. *United States*, 195 U. S. 27; *Kehrer* v. *Stewart*, 197 U. S. 60; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331.

The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified.

Order reversed and case remanded with directions to dismiss the bill.

TANNER, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, *v.* LITTLE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 224. Argued October 29, November 1, 2, 1915.—Decided March 6, 1916.

Rast v. *Van Deman & Lewis*, *ante*, p. 342, followed to effect that the State may regulate the use of, and impose license taxes on the privilege of using profit sharing coupons and trading stamps.

The statute of the State of Washington of 1907 imposing license taxes on the privilege of using profit sharing coupons and trading stamps is in its essential particulars similar to the statute of Florida sustained in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342: and, *held* that such statute was properly enacted in the exercise of the police power of the State in regard to matters subject to regulation, and that it is not unconstitutional under the Federal Constitution as interfering with or burdening interstate commerce, impairing the obligation of contracts, denying equal protection of the law, or depriving merchants of their property without due process of law. 208 Fed. Rep. 605.

THIS case was submitted with *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, and attacks the validity of a statute of the State of Washington of the same general import and purpose as the Florida statute passed on in that case, *Rast* v. *Van Deman & Lewis*, *ante*, p. 342.

The statute requires that every person, etc., who shall use or furnish to any other person, etc., to use in, with, or for the sale of any goods, etc., any stamps, etc., which shall entitle the purchaser receiving the same with such sale of goods, etc., to procure from any person, etc., any goods, etc., free of charge, or for less than the retail market price thereof, upon the production of any number of such stamps, etc., shall, before so furnishing, selling or using

the same, obtain a license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, etc., from which such furnishing or selling, or in which such using shall take place.

The statute fixes the license at $6,000, and there is a prohibition of the use of the stamps, etc., in any town, city or county other than that in which they are furnished or sold. Violation of the act is made a "gross misdemeanor."

The complainants are nineteen in number, counting partnerships as single individuals, and engaged in the business of hardware, cleaning and dyeing, grocery, soap, canned goods, meats, drugs, dry goods, boots and shoes, fuel, photography, laundry and wine. Complainants sue for all similarly situated.

Their allegations, condensed and narratively stated, are as follows: They carry on their respective businesses at Spokane, State of Washington, and advertise in various ways, which are enumerated, including the premium advertising system, so-called, and have at various times, for the purpose of increasing their general trade and volume of business, especially their cash trade, adopted and used a premium advertising system conducted as follows: with the sale of their goods and merchandise they each give to their cash customers stamps, tickets or coupons at the rate of one stamp for each cash purchase of a convenient unit amount, as one stamp for each 5, 10 or 25 cent cash purchase, as the case may be, which stamps or coupons entitle their customers to the choice of a certain cash discount or, free of charge, to certain articles of merchandise of their own selection, when presented in certain prescribed numbers for redemption to complainants who redeem their own stamps or certificates, or to a third party with whom other of the complainants have contracts, many of which are still in force, for the use of their pre-

mium advertising system, including the use of their trading stamps or coupons used in connection therewith, and the redemption thereof in merchandise.

Many of the complainants accept the coupons, at the cash value thereon printed, in payment or part payment of the cash retail price of the premium articles.

The stamps and coupons are redeemable in accordance with the terms of printed catalogues or premium lists. Booklets are distributed free among complainants' customers and describe the articles which may be secured by the stamps or coupons and state the number thereof required to obtain the same. The delivery of the required number of stamps or coupons set forth in the list is in full payment for the article specified and no money or other consideration is charged therefor.

There is no element of chance involved in the system. The value of each article is fixed as to cash and merchandise redemption and the right of every holder is secure. The articles are of sound value and durable manufacture and are open to inspection during business hours. The premiums are not regularly dealt in by many of the complainants but are used exclusively in connection with premium advertising.

A number of complainants have contracts based on the system running from one to five years for the use of their premium advertising system, including their trading stamps in connection therewith, which contracts are now in force and were in force at the passage of the act, and a large number of stamps are now in the hands of complainants and if they are prevented from disposing of them complainants will suffer great and irreparable loss.

A great many manufacturers of various lines of merchandise, for the purpose of advertising their businesses and increasing the volume of their sales, enclose in the packages of their merchandise coupons and other premium tokens which entitle the purchaser of such merchandise to

other articles of merchandise free of charge. The number of the manufacturers is given, their names and the articles which they manufacture.

Complainants have upon their shelves large quantities of merchandise in which premium tokens are packed, which upon their sale entitle purchasers to other articles in the manner described, and in such packages are tobacco and tobacco products, and the use of the coupons and tickets as described is authorized and rendered lawful by § 3394 of the Revised Statutes of the United States and the amendments of that section in 1897, July 24, c. 11, 30 Stat. 151, 206, and 1902, July 1, c. 1371, 32 Stat. 714, 715.

The adoption of the premium advertising system enables complainants to give a discount upon purchases of small as well as large amounts, one coupon or stamp being given with each 5, 10 or 25 cent cash purchase, or multiple thereof, as the case may be. And a larger discount in merchandise can be given than otherwise there could be because as a result of large purchases of the merchandise given in exchange for the tokens the articles are secured at much less than the regular retail price. By reason of the system complainants have been enabled at a moderate cost to greatly increase their businesses and profits and are benefited because their articles in the homes of their customers are a continual advertisement. And the businesses are lawful ones and not prejudicial to the public health, safety, morals or welfare.

The statute of Washington violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that it deprives complainants of their property without due process of law and of the equal protection of the laws (a) because it is not equal and uniform in operation, each of the complainants paying their taxes as do other merchants engaged in similar lines of business and who use other and various methods of advertising and

who are not required to pay a license tax of $6000. The statute is therefore arbitrary and discriminatory. (b) The tax is not upon the businesses of complainants but upon their incidents and is an unwarrantable interference with the method and manner of conducting the same, is arbitrary, oppressive, discriminatory, is in excess of profits and prohibitive, and, while in the guise of revenue will produce none. (c) It deprives complainants of their liberty and property without due process of law inasmuch as they cannot bestow a gift or give an order upon another merchant for a gift to a customer, which is the exercise of a natural right, without paying an onerous and excessive tax. (d) The penalties and fines are so drastic and excessive that they deter complainants from violating the act and testing its validity in a court of law. (e) The statute is in contravention of § 10, Article I, of the Constitution of the United States in that it impairs the obligations of contracts with and the right of complainants to contract with their customers to give trading stamps and coupons with the purchase of merchandise redeemable in merchandise heretofore given by them. It also impairs the obligations of contracts entered into by complainants with third parties for the use of the advertising system, including the use of the stamps and coupons and the redemption thereof in merchandise. (f) The statute is partial, unreasonable, oppressive, unequal, in restraint of trade and prohibitive of lawful business. (g) The statute conflicts with § 3394 of the Revised Statutes of the United States and the amendments thereof. (h) It is criminal, making a crime of acts the test of which is incapable of ascertainment, that is, it makes a crime of furnishing stamps or similar devices which are redeemable "for less than the retail market price thereof," the premium article having no definite or fixed retail market price. The statute is therefore void for indefiniteness and uncertainty; and such provision is besides prohibitive of the business

as the articles are not dealt in by complainants except in connection with the premium system. And further that the statute is void because it attempts to fix the price at which complainants shall sell their merchandise.

The prosecuting attorney of the county threatens to enforce the provisions of the statute, to bring numerous criminal prosecutions as well as civil suits to enforce the payment of the license, and if complainants are forced to discontinue their business as described they will suffer great and irreparable damage because they have expended large sums of money in advertising the premium system, which expenditures would be a total loss, they having large stocks of merchandise on hand in which are packed the premium tokens and which cannot be removed without practically destroying the packages and the value of the merchandise contained therein, and that therefore if not permitted to dispose of them complainants will lose a large amount of money.

Complainants have outstanding in the hands of customers a large amount of tokens, the result of transactions before the passage of the statute, and it will be necessary in order to keep faith with their customers for complainants to redeem such tokens in merchandise in the future from time to time as the necessary and requisite number of the same are presented for redemption. If they fail to do so they will lose many customers and a large amount of trade and suffer thereby great loss and injury.

Having no remedy at law, complainants pray an injunction, first temporary and then perpetual.

A temporary restraining order was issued, which the Attorney General and the prosecuting attorney of Spokane County separately made motions to quash, each appearing only for that purpose. The motions asserted exemption from suit of those officers in a Federal court because the suit was against them as officers of the State to prevent the enforcement of the criminal laws of the State and was

therefore a suit against the State in violation of the Eleventh Amendment to the Constitution of the United States.

Subsequently motions to dismiss were filed by them and also by the defendant Evenson, county treasurer of Spokane County. The grounds of the motions alleged were misjoinder of parties complainants and of defendants, improper union of causes of suit, insufficiency of the facts alleged to justify the relief prayed, the adequacy of a remedy at law, and the absence of jurisdiction over the persons of the defendants or of the subject-matter of the action.

The motion for an interlocutory injunction came before three judges. Rudkin, district judge, delivered the opinion and judgment ordering an injunction as prayed. 208 Fed. Rep. 605. This appeal was then taken.

Mr. Dallas V. Halverstadt and *Mr. Blackburn Esterline*, with whom *Mr. W. V. Tanner*, Attorney General of the State of Washington, was on the brief, for appellants:

Between 1888 and 1915, statutes prohibiting, restricting, or licensing on the payment of fees, the use of trading stamps, were passed by Alabama, Arkansas, California, Colorado, Florida, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, Indiana, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Hawaii. In 1873, Congress passed an Act making it a penal offense to engage in any gift enterprise in the District of Columbia, 17 Stat. 464, c. 148, which embraced the use of trading stamps, *Lansburgh* v. *District of Columbia*, 11 App. D. C. 512; *District of Columbia* v. *Kraft*, 35 App. D. C. 253; *In re Gregory*, 219 U. S. 210. By an express Act of Parliament the use of trading stamps is a crime in the Dominion of Canada. *Wilder* v. *Montreal*, 26 Rapp.

Jud. Quebec, 504, and note. This unanimity of the legislative mind refutes the argument that the use of trading stamps is only a legitimate and harmless system of advertising, and that the statute of Washington deprives the users of them of liberty and property without due process of law.

In 1913, the State of Washington, declared as the public policy of the State that the use of trading stamps should be restricted and regulated, Sess. Laws, 1913, p. 413, and the Supreme Court of the State sustained it in *State* v. *Pitney*, 79 Washington, 608, expressly overruling *Leonard* v. *Bassindale*, 46 Washington, 301, holding unconstitutional the previous act of 1905, p. 374.

Coincident with the arguments before this court in this case, the Supreme Court of Louisiana sustained the trading stamp statute of that State, *Louisiana* v. *Underwood*, La. Sup. C., October 8, 1915. See also on this subject article by Assistant Attorney-General Warren, 13, Col. Law Rev., April, 1913, p. 296; "Premiums in Retail Trade," by I. M. Rubinow, 13, Jour. Pol. Economy, Sept., 1905, No. 4, p. 574; "Cost of Distributing Groceries," by E. M. Patterson, Ph. D., Wharton School of Finance, Univ. Penna., 50, Annals Academy Pol. Science, No. 139, p. 74; "Fallacy of the Trading Stamp," by Arno Dosch, Pearson's Magazine, Aug., 1911; "Premium Giving," by Frank Farrington, in Store Management Complete, Byxbee Pub. Co., Chicago, 1911.

Many authorities sustain the propositions that the State may prohibit the use of trading stamps by virtue of the police power, and that the Washington Trading Stamp Act is not an arbitrary classification.

If the State possesses the power to tax for revenue, the extent of the exercise of the power is immaterial.

Mr. W. T. Dovell with whom *Mr. Frank T. Wolcott* was on the brief, for appellees:

The Act is prohibitive. *Murphy* v. *California*, 225 U. S. 623; *Rosenthal* v. *New York*, 226 U. S. 260.

To prohibit the conduct of the business is contrary to the law of the land. *Cotting* v. *Stock Yards Co.*, 183 U. S. 79; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Gulf, Colo. &c. Ry.* v. *Ellis*, 165 U. S. 150; *Halter* v. *Nebraska*, 205 U. S. 34; *Holden* v. *Hardy*, 169 U. S. 366; *Lawton* v. *Steele*, 152 U. S. 133; *Mugler* v. *Kansas*, 123 U. S. 623.

The prohibition does not fall within the police power because it tends to limit extravagance. In regard to sumptuary laws, see *Allnutt* v. *Inglis*, 12 East, 527; Cooley's Blackstone, Book I, p. 125; Cooley's Const. Lim. (7th ed.), p. 549; *Ex parte Dickey*, 144 California, 234; 2 Farrand's Records of the Fed. Conv. 344; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Humes* v. *Little Rock*, 138 Fed. Rep. 929; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *People* v. *Gillson*, 109 N. Y. 389; 17 N. E. Rep. 343; *People* v. *Steele*, 231 Illinois, 340; 83 N. E. Rep. 236; *People* v. *Zimmerman*, 92 N. Y. S. 497; *Pullman Co.* v. *Knott*, 35 Sup. Ct. Rep. 2; *Ex parte Quarg*, 149 California, 79; *Seattle* v. *Dencker*, 58 Washington, 501; *State* v. *Fire Creek Coal Co.*, 33 W. Va. 188; Stickney's State Control, ch. I, and see p. 100; Tiedeman's Pol. Pow., p. 154.

The Act is not brought within the police power because it may foster intermediate concerns. *Denver* v. *Frueauff*, 39 Colorado, 20; *Winston* v. *Beeson*, 135 N. Car. 271; *Commonwealth* v. *Gibson Co.*, 125 Kentucky, 440; *People* v. *Dycker*, 76 N. Y. S. 111; *People* v. *Zimmerman*, 92 N. Y. S. 497; *State* v. *Dalton*, 22 R. I. 77; *State* v. *Ramseyer*, 73 N. H. 31; *State* v. *Sperry & Hutchinson*, 110 Minnesota, 378.

The Act denies equal protection of the law because the attempted classification for the purpose of a license tax is purely arbitrary. Cases *supra* and see *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Winston* v. *Beeson*,

135 N. Car. 271; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Ex parte Drexel*, 147 California, 763; *Ex parte Hutchinson*, 137 Fed. Rep. 949; *Southern Ry.* v. *Greene*, 216 U. S. 400; *Sperry & Hutchinson* v. *Temple*, 137 Fed. Rep. 992; *State* v. *Loomis*, 115 Missouri, 307.

The practice of using premium stamps is legitimate as a method of advertising. The coupon system furnishes a peculiar and legitimate inducement for the return of a customer. Coöperation among merchants in the use of the premium system is lawful and the adjudicated cases have held the classification arbitrary. *Montgomery* v. *Kelly*, 142 Alabama, 552; *Commonwealth* v. *Gibson Co.*, 125 Kentucky, 440; 101 S. W. Rep. 385; *Hewin* v. *Atlanta*, 121 Georgia, 723; *Ex parte McKenna*, 126 California, 429; *O'Keeffe* v. *Somerville*, 190 Massachusetts, 110; *Van Deman & Lewis Co.* v. *Rast*, 214 Fed. Rep. 827.

If the business or practice is lawful, it may not be prohibited indirectly by a license tax. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560; Cooley on Taxation (3d ed.), pp. 260, 1140, 1143; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; Harvard Law Review, Vol. XXVI, p. 682; *Kehrer* v. *Stewart*, 197 U. S. 60; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *McCray* v. *United States*, 195 U. S. 27; *M'Culloch* v. *Maryland*, 4 Wheat. 316; 3 McQuillin on Mun. Corp., § 1002; *Post. Tel. Co.* v. *Charleston*, 153 U. S. 692; *Spencer* v. *Merchant*, 125 U. S. 345; *Union Pac. R. R.* v. *Peniston*, 18 Wall. 5; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Weston* v. *Charleston*, 2 Pet. 449; *Wiggins Ferry Co.* v. *St. Louis*, 107 U. S. 365.

Repeated attempts to enact such legislation offer no argument for its constitutionality. *Chaddock* v. *Day*, 75 Michigan, 527; *Marbury* v. *Madison*, 1 Cranch, 137.

The "Retail Market Price" provision in the Act renders it unconstitutional. Bishop on Stat. Crimes (2d ed.), § 41; *Brown* v. *State* (Wis.), 119 N. W. Rep. 338; *Buckles* v. *State*, 5 Oklahoma, 109; 113 Pac. Rep. 244; *Chicago &*

N. W. Ry. v. *Dey*, 35 Fed. Rep. 866; *Collins* v. *Kentucky*, 234 U. S. 634; *Cook* v. *State* (Ind.), 59 N. E. Rep. 489; *Int. Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Kilbourne* v. *State*, 84 Oh. St. 247; 2 Lewis' Suth. Stat. Cons. (2d ed.), § 520; *Louis. & Nash. R. R.* v. *Commonwealth*, 33 L. R. A. 209; *Matthews* v. *Murphy*, 23 Ky. Law Rep. 750; *Savage* v. *Wallace*, 165 Alabama, 572; *Tozer* v. *United States*, 52 Fed. Rep. 917.

The Act is invalid because its observance requires the removal of inserts. *Asbell* v. *Kansas*, 209 U. S. 251; *Bettman* v. *Warwick*, 108 Fed. Rep. 46; *Commonwealth* v. *Sherman Mfg. Co.*, 75 N. E. Rep. 71; *Felsenheld* v. *United States*, 186 U. S. 126; *Halter* v. *Nebraska*, 205 U. S. 34; *M'Culloch* v. *Maryland*, 4 Wheat. 316; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Mo., Kan. & Tex. Ry.* v. *Haber*, 169 U. S. 613; *Mugler* v. *Kansas*, 123 U. S. 623; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *People* v. *Van De Carr*, 178 N. Y. 425; *People* v. *Zimmerman*, 92 N. Y. S. 497; *Savage* v. *Jones*, 225 U. S. 501; *Second Employers' Liability Cases*, 223 U. S. 1; *Sinnot* v. *Mobile*, 22 How. 227; *Smith* v. *Alabama*, 124 U. S. 465; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Tex. & Pac. Ry.* v. *Abilene Oil Co.*, 204 U. S. 426.

Excessive penalty renders Act unconstitutional. *Bonnett* v. *Vallier* (Wis.), 116 N. W. Rep. 885; *Cons. Gas Co.* v. *New York*, 157 Fed. Rep. 849; *Cotting* v. *Stock Yards*, 183 U. S. 79; *Grenada Co.* v. *Mississippi*, 217 U. S. 433; *Mo. Pac. Ry.* v. *Tucker*, 230 U. S. 340; *Portland Ry.* v. *Portland*, 201 Fed. Rep. 119; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *State* v. *Crawford*, 74 Washington, 248; 133 Pac. Rep. 590; *United States* v. *Del. & Hud. Co.*, 213 U. S. 366; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 111; *Ex parte Young*, 209 U. S. 123.

The cases of *Dist. of Col.* v. *Kraft*, 35 App. D. C. 253 and *Lansburgh* v. *Dist. of Col.*, 11 App. D. C. 512, can be distinguished.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The court ruled against the motions to dismiss, and concurring with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants, we pass to the consideration of the validity of the statute of the State. Of that it was said: "The court is fully satisfied from a bare inspection of the act without more and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. It is plainly manifest that no merchant could afford to pay the sum of $6,000 annually for the mere privilege of giving away trading stamps or allowing discount on his cash sales. But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution. The power of taxation rests upon necessity and is inherent in every independent State. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy. *Post. Tel. Co.* v. *Charleston*, 153 U. S. 692, 699; *McCray* v. *United States*, 195 U. S. 27; *Kehrer* v. *Stewart*, 197 U. S. 60."

The charge of discrimination against the statute was decided to be a factor as to its validity. The use of trading stamps and other similar devices was regarded as a legitimate system of advertising and that to distinguish it from other systems of advertising was a violation of the equality clause of the Federal Constitution. And it was said: "As well might the legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling who do not so advertise."

In this conclusion we think, for the reasons expressed in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, just decided, that the court erred. We have been at pains to summarize the bill in this case to show its similitude to that.

The coupons in this case, in compliance with the law of the State of Washington (Laws of 1907, p. 742), must be redeemed in cash if demanded by the purchaser; otherwise in articles of merchandise selected by him. The redemption of the coupons in some instances is directly by the merchant issuing them; in others, it is alleged, by "a third party, with whom said complainants have a contract for the use of their trading stamps or coupons used in connection therewith and the redemption thereof in merchandise." These differences, however, do not affect the principle announced in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342. Whether the coupons are prepared by the issuing merchant or prepared by another, whether they be redeemed by him or by another, is but a phase of the system, not affecting its essential character. And we may say here, as we said in *Rast* v. *Van Deman & Lewis*, that we are not concerned with consideration of a business in which coupons, etc., are issued or used and not redeemed in merchandise, that is, where they are used as a rebate upon the price of the article or a discount upon purchases, nor with the legality of a statute which should regulate or prevent such use of the coupons disassociated from other uses of them. Complainants contend for a broad use and assert that there cannot legally be any limitation of their methods of redemption, which they comprehensively denominate the "premium system."

The opinion in *Rast* v. *Van Deman & Lewis* is, therefore, decisive of the contentions in this case. We said there that there were manifest differences between the "premium system" of advertising and the other methods enumerated and that those differences justified a difference in measures. And this is justified not only by the wide

discretion which may be exercised in legislation but by a rigid principle of classification. Classification is not different in law than in other departments of knowledge. "It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those particulars.'" *Billings* v. *Illinois*, 188 U. S. 97, 102. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered. It may not make the distinction adverted to but it may make others the appropriateness of which, considered logically, may be challenged, for instance: between sales of stock upon margin or for immediate or future delivery (*Otis* v. *Parker*, 187 U. S. 606); between acts directed against a regularly established dealer and one not so established (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (*St. Louis Cons. Coal Co.* v. *Illinois*, 185 U. S. 203); and a like distinction in a workmen's compensation law (*Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571); between a combination of purchasers and a combination of laborers (*International Harvester Co.* v. *Missouri*, 234 U. S. 199); between residents and non-residents (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and

roads of that length or less (*N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; see also *Dow* v. *Beidleman*, 125 U. S. 680; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688); between theatres according to the price of admission (*Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61); between land owners as to liability for permitting certain noxious grasses to go to seed on the lands (*Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267); between businesses, in the solicitation of patronage on railroad trains and at depots (*Williams* v. *Arkansas*, 217 U. S. 79); and a distinction based on the evidence of the qualifications of physicians (*Watson* v. *Maryland*, 218 U. S. 173, 179).

Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction was in the interest of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject-matter, and having proper bases of community.

But the classification which was sustained in *St. Louis Coal Co.* v. *Illinois*, 185 U. S. 203, was condemned in *Truax* v. *Raich*, 239 U. S. 33. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80% qualified electors or native born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times. Let us apply the test to the case at bar. Let it be granted that the "premium system" is a method of advertising, can there not be differences in advertising

which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? *Fifth Ave. Coach Co.* v. *New York*, 221 U. S. 467; *Commonwealth* v. *McCafferty*, 145 Massachusetts, 384. However, a decisive answer to the questions, need not be given, for we have said, in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, that the "premium system" is not one of advertising merely. It has other, and, it may be, deleterious, consequences. It does not terminate with the bringing together of seller and buyer, the profit of one and the desire of the other satisfied, the article bought and its price being equivalents. It is not so limited in purpose or effect. It has ulterior purpose, and how it has developed complainants vividly represent by their averments. It appears that companies are formed, called trading stamp companies,[1] which extend and facilitate the schemes, making a seller of merchandise their agent for the distribution of stamps to be redeemed by them or other merchants, the profit of all being secured through the retail purchaser who has been brought under the attraction of the system. There must, therefore, be something more in it than the giving of discounts, something more than the mere laudation of wares. If companies—evolved from the system, as counsel say in justification of them—are able to reap a profit from it, it may well be thought there is something in it which is masked from the common eye and that the purchaser at retail is made to believe that he can get more out of the fund than he has put into it, something of value which is not offset in the prices or quality of the articles which he buys. It is certain that the prices he pays make the

[1] *Lansburgh* v. *District of Columbia*, 11 App. D. C. 512; *Attorney General* v. *Sperry & Hutchinson Co.*, 110 Minnesota, 378; *Louisiana* v. *C. A. Underwood or Southern Merchandise Exchange*, decided October 18, 1915, by the Supreme Court of Louisiana; *Hewin* v. *Atlanta*, 121 Georgia, 723.

efficiency of the system and the fund, if we may individualize it, out of which the cost of the instruments and agents of the system must be defrayed and the profit to all concerned paid. The system, therefore, has features different from the ordinary transactions of trade which have their impulse, as we have said, in immediate and definite desires having definite and measurable results. There may be in them at times reckless buying, but it is not provoked or systematized by the seller.

Complainants charge that the tax of the statute is not upon the business but upon its incidents. The separation is artificial. It is the incidents which give character to the business, affecting it with evil, it was thought, provoking therefore against it the power of the State and taking away from it the immunity it else might have.

It is unimportant what the incidents may be called, whether a method of advertising, discount giving or profit sharing. Their significance is not in their designations but in their influence upon the public welfare. And of this the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength. Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature. *McLean* v. *Arkansas*, 211 U. S. 539. Such belief

has many examples in state legislation and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation, certainly, from its generality, it cannot be declared to be made in mere wantonness. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204–205.

Discrimination aside, the power to enact the legislation we need not discuss, but may refer to the opinion in *Rast* v. *Van Deman & Lewis*. Of course, it is in the exercise of the police power of the State. We will not here define it or its limitations. As was said by Mr. Justice Brown, in *Camfield* v. *United States*, 167 U. S. 518, 524, citing *Rideout* v. *Knox*, 148 Massachusetts, 368, "The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests."

In the view that the license is prohibitive we may concur, and concede that such is the effect given it by the Supreme Court of the State in *Pitney* v. *Washington*, *post*, p. 387, one of the cases submitted with this one. And we think it was competent for the State to give it that effect. The cases cited by Judge Rudkin and those cited in the opinion in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, so established.

For answer to the other contentions which we consider material to notice we refer to that case.

Decree reversed and case remanded with directions to dismiss the bill.

PITNEY v. STATE OF WASHINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 242. Argued October 29, November 1, 2, 1915.—Decided March 6, 1916.

On authority of *Rast* v. *Van Deman & Lewis Co.*, *ante*, p. 342, and *Tanner* v. *Little*, *ante*, p. 369, *held* that the trading stamp license statute of Washington is not unconstitutional under the commerce clause of, or the due process or equal protection provision of the Fourteenth Amendment to, the Federal Constitution.

79 Washington, 608, affirmed.

THE facts, which involve the constitutionality, under the commerce clause of the Federal Constitution and the due process and equal protection provisions of the Fourteenth Amendment thereto, of the trading stamp license tax laws of the State of Washington, are stated in the opinion.

Mr. Louis Marshall, with whom *Mr. Sol. M. Stroock* was on the brief, for plaintiff in error:

The Washington statute under which the plaintiff in error has been convicted, violates the Fourteenth Amendment, in that it deprives him of his liberty and property without due process of law.

The act cannot be sustained as a revenue measure, its purpose being clearly to prohibit the use of an incidental business instrumentality by means of a confiscatory license fee, in evasion of rights secured by the Fourteenth Amendment.

The act, upon its face, indicates that it is not a revenue measure.

Even, if viewed as possibly a revenue measure, this act would be invalid.

The statute does not purport to be a revenue law, but

is at most merely a license law enacted in the attempted exercise of the police power.

Independently of these views, this legislation deprives merchants who use in their business stamps, coupons, tickets, certificates or similar devices, in connection with their sales, of the equal protection of the law.

Mr. Dallas V. Halverstadt and *Mr. Blackburn Esterline*, with whom *Mr. W. V. Tanner*, Attorney General of the State of Washington, and *Mr. Alfred H. Lundin* were on the brief, for defendant in error.[1]

Mr. Justice McKenna delivered the opinion of the court.

A companion case with *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, and *Tanner* v. *Little*, *ante*, p. 369. It was argued and submitted with those cases and involves the same general questions and the validity of the statute passed upon in the latter case.

A criminal information was filed in the Superior Court of the State of Washington for the County of King charging that the United Cigar Stores Company, Inc., a New Jersey corporation, doing business in the State of Washington, owned and conducted a certain store and place of business in the City of Seattle and had not then or theretofore obtained a separate license from the auditor of the county entitling it at its store and place of business to use or furnish to other persons, etc., to use, in, with or for the sale of any goods, etc., any stamps, etc., or other similar devices, entitling the purchaser receiving the same to procure from any person, etc., any goods, etc., free of charge or for less than the retail price thereof upon the production of any number of said stamps, etc.

That Pitney (plaintiff in error), at said place of business,

[1] For abstract of argument, see *ante*, p. 375.

well knowing the above facts, did then and there unlawfully, as the manager, servant and agent of the United Cigar Stores Company, Inc., use and furnish in, with and in connection with the sale of certain goods, etc., to one John Garvin a certain stamp, etc., of the following tenor:

"No. 139,198. Dr.

"United Cigar Stores Company (Incorporated).

"CERTIFICATE.

"Cash value at any Profit Sharing Station in the State of Washington, 1 cent, but average merchandise value, according to profit sharing list, 2 cents.

"This certificate represents a twenty-five cent purchase and is redeemable according to the conditions of our profit sharing list. Ask for a copy of list. Redeemable only by the person to whom originally issued.

"United Cigar Stores Company (Incorporated).

"Largest Cigar Retailers in the world."

And it was alleged that Garvin received the same.

A demurrer was filed to the information, the grounds of which were, as alleged, that the defendant had not violated any law, that the information failed to state facts sufficient to constitute a crime or misdemeanor and that it did not charge any offense against the laws of Washington. The demurrer was sustained and the case dismissed. This action was reversed by the Supreme Court of the State and the cause remanded with directions to overrule the demurrer. 79 Washington, 608.

Upon the return of the case to the Superior Court the demurrer was overruled and defendant pleaded guilty. He then moved in arrest of judgment, invoking against the law and sentence under it Articles V and VIII of the Constitution of the United States and § 1 of the Fourteenth Amendment of that Constitution.

It was stipulated that Pitney, as charged, furnished Garvin a certain stamp, etc., which entitled Garvin to procure from the United Cigar Stores Co., Inc., upon the

production of a certain specified number of such stamps, etc., or other similar device, certain goods, etc., free of charge; that the stamp, etc., so delivered to Garvin was redeemable by the company alone and entitled him to receive from the company and from no other such goods, etc.; that the stamp, etc., was by its terms redeemable in goods, etc., or 1 cent in cash at the option of the holder as provided by the laws of the State of Washington.[1]

Judgment of a fine of $10 and costs was pronounced against him, which was affirmed by the Supreme Court for the reasons announced in its former opinion. The case was then brought here by writ of error allowed by the Chief Justice of the State.

The court overruled *Leonard* v. *Bassindale*, 46 Washington, 301, in which case it had decided that the law, passed in 1905, prohibiting the use of trading stamps was unconstitutional, giving as reason that the police power of the State, as expounded and illustrated by the decisions of this court, was legally exercised in the passage of the statute.

The reasons and conclusion of the court are combated

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[1] The law of Washington, passed in 1907 (Laws 1907, p. 742), provided:

(§ 1) That no stamps, etc., or other similar device which should entitle the holder thereof to receive from the vendor or indirectly through any other person, money or goods, etc., should be sold or issued unless each of the stamps, etc., should have legibly printed or written upon the face thereof the redeemable value thereof in cents.

(§ 2) That such stamps, etc., should be redeemable in goods, etc., "or in cash, good and lawful money of the United States, at the option of the holder thereof," and any number of such stamps, etc., should be redeemed at the value thereof in cents printed on the face thereof, and it should not be necessary for the holder thereof to have any stipulated number of the same.

(§ 3) That in case of refusal to redeem the stamps, etc., the vendor or such other person should be liable to the holder thereof for the face value thereof.

(§ 4) Violation of the act is made a misdemeanor.

by plaintiff in error by the same considerations and arguments that were advanced in *Rast* v. *Van Deman & Lewis*, *ante*, p. 342, and *Tanner* v. *Little*, *ante*, p. 369. What we said in answer to them there we need not repeat here, and upon the authority of those cases the judgment of the Supreme Court must be, and it is,

Affirmed.

BADDERS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 521. Argued February 23, 24, 1916.—Decided March 6, 1916.

Congress has power to regulate the overt act of putting a letter into the post office of the United States; and may prohibit, under penalty, such an act when done in furtherance of a scheme which it regards as contrary to public policy, whether it can forbid the scheme or not, and so *held* as to Criminal Code, § 215.

Intent may make criminal an act, otherwise innocent, if it is a step in a plot.

Congress may enact that each putting of a letter in a post office is a separate offense.

The punishment imposed in this case on each of five counts, of five years, the periods being concurrent and not cumulative, and a fine of $1,000 on each of seven counts, *held* not to be cruel and unusual within the prohibition of the Federal Constitution.

This court condemns the extravagant and unnecessary multiplication of exceptions and assignments of error.

THE facts, which involve the construction and constitutionality of § 215, Criminal Code, and the validity of a conviction and sentence thereunder, are stated in the opinion.

Mr. James H. Harkless, with whom *Mr. D. R. Hite* and *Mr. Clifford Histed* were on the brief, for plaintiff in error:

Section 215 of the Criminal Code as applied to the in-

dictment, trial and conviction of the defendant, is unconstitutional and void.

As interpreted by the trial court, § 215 encounters that provision of the Constitution which provides "that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Where the accused is held under a Federal indictment which does not substantially state an offence against the laws of the United States, he is deprived of his constitutional right to be informed of the charge against him.

The statement of facts in that part of the indictment attempting to charge a scheme or artifice is insufficient.

The indictment is fatally defective in that it does not state facts showing that the defendant devised any scheme or artifice; also because it does not charge an intent on the part of the defendant to use the post office establishment as a means to effect the alleged scheme or artifice.

The indictment is duplicitous in that it cannot be determined whether it charges the defendant with having devised a scheme or artifice to defraud, or a scheme or artifice for obtaining property by means of false or fraudulent pretences, representations or promises.

Plaintiff in error is held to answer for an infamous crime without an indictment of a grand jury found and presented as required by law.

Having directed an officer of the court to produce material documentary evidence in his possession, necessary for the defence, the court erred in refusing defendant time and opportunity to supply secondary evidence of the contents of such documents when the officer failed to produce them, claiming that they had disappeared.

The defendant was not arraigned as required by law.

The court's refusal to give the instructions requested by the defendant constitutes material and prejudicial error.

The evidence is insufficient to sustain verdicts of guilty as to any of the counts of the indictment.

Numerous authorities, both state and Federal, support these contentions.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case is brought to this court from the District Court under § 238 of the Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1087, 1157, on the ground that it involves the construction and application of the Constitution of the United States. The plaintiff in error was indicted for placing letters in the mail for the purpose of executing a scheme to defraud devised by him, in violation of § 215 of the Criminal Code, Act of March 4, 1909, c. 321; 35 Stat. 1088, 1130. There were twelve counts, on seven of which, each relating to a different letter, he was found guilty. He was sentenced to five years' imprisonment on each count, the periods being concurrent not cumulative, and also to a fine of $1,000 on each, or $7,000 in all. The grounds for coming to this court are first that § 215 of the Criminal Code is beyond the power of Congress as applied to what may be a mere incident of a fraudulent scheme that itself is outside the jurisdiction of Congress to deal with; and second that if it makes the deposit of each letter a separate offence subject to such punishment as it received in this case it imposes cruel and unusual punishment and excessive fines.

These contentions need no extended answer. The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte Jackson*, 96 U. S. 727. Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not. *In re Rapier*,

143 U. S. 110, 134. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507. *United States* v. *Stever*, 222 U. S. 167, 173. See *Lottery Case* (*Champion* v. *Ames*), 188 U. S. 321, 357. *United States* v. *Holte*, 236 U. S. 140, 144. Intent may make an otherwise innocent act criminal, if it is a step in a plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The acts alleged have been found to have been done for the purpose of executing the scheme, and there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them. The whole matter is disposed of by *United States* v. *Young*, 232 U. S. 155, 161. As to the other point, there is no doubt that the law may make each putting of a letter into the postoffice a separate offence. *Ebeling* v. *Morgan*, 237 U. S. 625. *In re Henry*, 123 U. S. 372, 374. And there is no ground for declaring the punishment unconstitutional. *Howard* v. *Fleming*, 191 U. S. 126, 135. *Ebeling* v. *Morgan*, *supra*.

The other matters discussed are before us only as incident to the constitutional questions upon which the case was brought here. As those questions merely attempt to reopen well established and familiar law it is not necessary to go beyond them. *Brolan* v. *United States*, 222 U. S. 215, 216, 222. There is the more reason for declining further consideration in the extravagant and unnecessary multiplication of exceptions and assignments of error that often has been condemned by this court. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 509. If there were anything in the objections to the indictment they are not of a kind to involve constitutional rights, *Lamar* v. *United States*, 240 U. S. 60, although the argument attempts to give a constitutional turn to them and to other technical complaints, such as that the judge was absent during a part of the deliberations of the grand jury. We find no error in this or the other particulars mentioned in argument.

240 U. S. Counsel for Plaintiffs in Error.

Jones v. *United States*, 162 Fed. Rep. 417, 421. *S. C.*, 212 U. S. 576. *Commonwealth* v. *Bannon*, 97 Massachusetts, 214, 220. See *Brees* v. *United States*, 226 U. S. 1, 11. As to the arraignment see *Garland* v. *Washington*, 232 U. S. 642, 646, 647. We deem it unnecessary to go into further detail.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* MESSINA.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 535. Argued February 23, 1916.—Decided March 6, 1916.

While the Anti-pass Provision of the Hepburn Act of 1906 may have had more formal uses especially in view than that of allowing a person to ride upon an interstate train by permission of an employé of the carrier, this court cannot limit the prohibition to such uses.

There being a question whether plaintiff, who was injured while riding free by consent of the engineer on the engine of an interstate train, could have recovered under state law had his presence been illegal under the Federal statute, *held* that it was reversible error not to have charged the jury that the Federal act applied.

THE facts, which involve the construction and application of the Anti-pass provision of the Hepburn Act of 1906, are stated in the opinion.

Mr. R. V. Fletcher, with whom *Mr. Edward Mayes* and *Mr. Blewett Lee* were on the brief, for plaintiffs in error.

Mr. Harry Peyton, with whom *Mr. William H. Watkins* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries suffered by the defendant in error while upon a train running from Mississippi to Tennessee. He had paid no fare but was upon the tender, as he said, by permission of the engineer. The engineer had noticed that the water was high between Beatty and Sawyer and over the track at Sawyer. After passing Beatty the train was going at a rate variously put as thirty-five to fifty or sixty miles an hour when it ran into the water and was thrown from the track. The plaintiff was caught between the tender and a car and badly hurt.

The plaintiff got a judgment for $10,000, which was sustained by the Supreme Court. At the trial the jury were instructed that the defendant railroad was presumed to be negligent and that if the evidence left it doubtful it was their duty to find full damages for the plaintiff. The judge refused to instruct them that the engineer had no authority to permit the plaintiff to ride on the train 'at the place he was in,' but the request for this instruction was based upon the company's rules, not upon the Act to Regulate Commerce. The Supreme Court, however, discussed the act of Congress and held that it did not apply to the case.

By § 1 of the act of Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, and still in force, any common carrier violating the provisions against free transportation is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted 'who uses any such interstate . . . free transportation' is made subject to a like penalty. No doubt the enactment had somewhat more formal

uses especially in view, but we see no reason for limiting the prohibition to them. The word 'such' like 'said' seems to us to indicate no more than that free transportation had been mentioned before. We cannot think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain free carriage he would escape the Act. We are of opinion therefore that the Act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. *West Un. Tel. Co.* v. *McLaurin*, 66 So. Rep. 739. And although there are expressions in the opinion below that raise a doubt, the fact that the Supreme Court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed.

Judgment reversed.

MR. JUSTICE HUGHES, dissenting.

The Supreme Court of the State held that the provision of the Federal act was not applicable to this case, and I think that the court was right. Congress did not concern itself with the possibility that prominent persons, or others, might steal a ride through the unauthorized action of some employee of the railroad company. Congress was concerned with the well known abuse which consisted in the giving of passes, or free transportation, by railroad companies, and it directed its legislation to that abuse. The provision is: "No common carrier subject to the provisions of this Act shall, . . . directly or indirectly, *issue* or *give* any interstate free ticket, free pass, or free transportation for passengers," except as stated; and

that "any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offence, on conviction shall pay . . . a penalty . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty." Here, it was found that the engineer had no authority to give any free transportation to the plaintiff and I cannot but think that in this view the defendant in error was outside the Act. The Supreme Court of the State said: "The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling the passenger train, under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. . . . It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the Act of Congress is not directed against acts of the character here involved."

I know of no reason for disregarding the finding of the state court as to want of authority in the engineer, and it was on this hypothesis that the court held the Federal provision to be inapplicable. Aside from this ruling, it it is not suggested that any Federal question is involved.

I am authorized to say that MR. JUSTICE MCKENNA concurs in this dissent.

CAUSEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 197. Argued January 26, 1916.—Decided March 6, 1916.

The rule, that findings of fact concurred in by the Master and both courts below should not be disturbed unless clearly erroneous, applied in this case to findings that the original entryman had entered into an unlawful agreement and fraud to pass title when acquired to another.

It is immaterial in such a case whether a homestead entry is perfected by five years' residence and cultivation or by commutation and payment of minimum price, as an agreement to obtain the land for another disqualifies the entryman from acquiring the title in either mode.

While there is no controlling statute, and it is therefore essential that a suit in the name of the United States to cancel a homestead patent be brought with the approval of the Attorney General, that objection, in this case, is met by the fact that the United States is represented in this court by an assistant attorney general and the production of a letter of the Attorney General authorizing the suit.

This court may infer in the circumstances of this case that the letter was exhibited in the courts below to meet the objection that the case was brought without the sanction of the Attorney General.

The United States, in disposing of its public lands, is not on the same plane as a mere seller of real estate at market value; questions of enforcement of statutes and of public policy are involved in suits to cancel patents and the rule applicable to private contracts that the vendor seeking to rescind must be ready to return the consideration does not apply to the Government in such a suit.

A wrongdoer, whose patent to land is cancelled by reason of his own fraud, must restore the land and abide the judgment of Congress as to whether the consideration he paid shall be refunded.

THE facts, which involve the validity of an entry of and patent for public lands under the homestead laws, are stated in the opinion.

Mr. T. Marshal Miller for appellant.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to recover the title to 157.77 acres of land in Ascension Parish, Louisiana, patented to Powhatan E. Causey and by him transferred to James L. Bradford. While the land was yet public, Causey secured a preliminary homestead entry thereof by taking an oath, as was required, that he had not directly or indirectly made, and would not make, any agreement whereby the title which he might acquire would inure in whole or in part to the benefit of another. After the expiration of fourteen months he secured a final entry under the commutation provision of the homestead law by presenting proof that he had not sold or contracted to sell any part of the land, and by paying therefor in so-called scrip at the rate of $1.25 per acre. Pursuant to the final entry the land was patented to him, and he transferred it to Bradford. As grounds for the suit the bill charges that the oath and proof whereby the entries were secured were false in that when Causey applied for the preliminary entry he had entered into an agreement with one Wright, a clerk and agent of Bradford, whereby the title when acquired was to be passed to the latter, that both entries were made in pursuance of this unlawful agreement and were therefore fraudulent, and that Bradford took the transfer from Causey under the agreement and with full knowledge of the fraud perpetrated upon the Government. It also is alleged that in virtue of an arrangement with Bradford, Causey is claiming an interest in half of the land. With Bradford's

consent a decree was entered against him. Causey answered denying the unlawful agreement and fraud, and the suit was referred to a master, who found the facts to be as charged in the bill. The findings were sustained by the District Court, which entered a decree against Causey, and the decree was affirmed by the Circuit Court of Appeals. 203 Fed. Rep. 1022.

Complaint is made of the findings. They were concurred in by the master and both courts, and therefore should be permitted to stand unless shown to be plainly erroneous. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Gilson* v. *United States*, 234 U. S. 380, 383. Testing them by the evidence we discover no plain error, but, on the contrary, that they are amply sustained.

That the title was acquired by substituting the minimum price of the land for a part of the required five years of residence and cultivation, as permitted by the commutation provision of the homestead law, is not material, for the agreement to obtain the land for the benefit of another disqualified Causey from acquiring the title in either mode. *Bailey* v. *Sanders*, 228 U. S. 603, 608; *Gilson* v. *United States*, 234 U. S. 380, 384.

The bill, while purporting to be brought in the name and for the benefit of the United States, and bearing the signature of the assistant United States attorney for the district, does not state or show that it is brought with the sanction of the Attorney General, and because of this it is objected, as it was in both courts below, that the bill should not be entertained but dismissed. In the absence of a controlling statute, and there is none, it is essential to such a suit that it be brought with the Attorney General's approval; and while the usual and better practice is to state or show in the bill that it is brought with his approval, this is not indispensable. The case is argued here on behalf of the Government by one of the Assistant Attorneys General, who files a certified copy of a letter

from the Attorney General authorizing the institution of the suit conformably to a request of the Secretary of the Interior. This sufficiently meets the objection, especially as it is fairly inferable that the letter was exhibited in the courts below. *United States* v. *Throckmorton*, 98 U. S. 61, 70; *McLaughlin* v. *United States*, 107 U. S. 526, 528; *Mullan* v. *United States*, 118 U. S. 271, 276; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278–287.

The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170–171; *Heckman* v. *United States*, 224 U. S. 413, 447. And see Rev. Stat., § 2362; Act June 16, 1880, c. 244, § 2, 21 Stat.

287; *Hoffeld* v. *United States*, 186 U. S. 273; *United States* v. *Commonwealth Trust Co.*, 193 U. S. 651; *United States* v. *Colorado Anthracite Co.*, 225 U. S. 219.

Decree affirmed.

HANOVER STAR MILLING COMPANY *v.* METCALF.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ALLEN & WHEELER COMPANY *v.* HANOVER STAR MILLING COMPANY.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 23. Argued May 7, 10, 1915; No. 30. Argued May 10, 1915.—Decided March 6, 1916.

Two District Courts in different circuits having granted temporary injunctions, and both Circuit Courts of Appeals having reversed upon grounds that went to the merits and differed upon fundamental questions affecting the same trade-mark, writs of certiorari were allowed by this court before final decrees notwithstanding the general rule to the contrary.

Where neither of the parties, citizens of different States, has registered the trade-mark in dispute under any act of Congress or under the law of any State, and no local rule arising from statute or decision is shown, cases involving the use of such trade-mark must be determined according to applicable common-law principles.

Redress accorded in trade-mark cases is based upon the party's right

to be protected in the good will of the trade or business; and the English rule that a trade-mark is not the subject of property, except in connection with an existing business, prevails generally in this country.

The common law of trade-marks is but a part of the broader law of unfair competition.

While common-law trade-marks and the right to their exclusive use may be classed among property rights, the right grows out of use and not mere adoption.

Where two parties independently employ the same trade-mark or name, not in general use and susceptible of adoption, upon goods of the same class but in separate and remote markets, the question of prior appropriation is legally insignificant in the absence of intent on the part of the later adopter to take the benefit of the reputation, or to forestall extension of the trade, of the earlier adopter.

While property in a trade-mark is not limited, so far as its use has extended, by territorial bounds, the earlier adopter may not monopolize markets that his trade has never reached and where the mark signifies not his goods but those of another.

So far as controversy over a trade-mark concerns intrastate distribution as distinguished from interstate trade the subject is not within the sovereign power of the United States.

Trade-mark rights, like others that rest in user, may be lost by abandonment, non-user, laches or acquiescence.

Where a later adopter, in good faith and without notice of its use in other territory by an earlier adopter, expends money and effort in building up a trade in a territory, which the earlier adopter has left unoccupied for a long period—in this case more than forty years—and into which his trade would not naturally expand, the earlier adopter is estopped to assert trade-mark infringement in that territory.

A third party who enters the territory of such second adopter and attempts to use the trade-name in a manner calculated to, and which does, deceive by similarity of package, even though the name of the actual manufacturer is placed thereon, is guilty of unfair competition from which the user of the trade-mark is entitled to protection.

There being diverse citizenship and the jurisdiction of the District Court resting thereon the decision of the Circuit Court of Appeals in a trade-mark case is final and an appeal from the decree is dismissed and the decree is reviewed here on certiorari.

204 Fed. Rep. 211, reversed.
208 Fed. Rep. 513, affirmed on certiorari and appeal therefrom dismissed.

THE facts, which involve the rights of manufacturers of and dealers in flour to the use of "Tea Rose" as a trade-mark, for flour sold in certain territory, and the effect of non-user on right to use a trade-mark, are stated in the opinion.

Mr. Edgar L. Clarkson and *Mr. Henry Fitts*, with whom *Mr. James E. Morrisette* and *Mr. John London* were on the brief, for Hanover Star Milling Company.

Mr. J. Fred Gilster and *Mr. Edward Everett Longan* for Metcalf.

Mr. J. Fred Gilster and *Mr. Edward Everett Longan*, with whom *Mr. L. O. Whitney* was on the brief, for Allen & Wheeler Company.

MR. JUSTICE PITNEY delivered the opinion of the court.

These cases were argued together, and may be disposed of in a single opinion.

In No. 23, the Hanover Star Milling Company, an Illinois corporation engaged in the manufacture of flour in that State, filed a bill in equity on March 4, 1912, in the United States District Court for the Middle District of Alabama, against Metcalf, a citizen of the State of Alabama and a merchant engaged in the business of selling flour at Greenville, Butler County, in that State, to restrain alleged trade-mark infringement and unfair competition. The bill averred that for twenty-seven years last past complainant had been engaged in the manufacture of a superior and popular grade of flour, sold by it at

all times under the name of "Tea Rose" flour, in a wrapping with distinctive markings, including the words "Tea Rose" and a design containing three roses imprinted upon labels attached to sacks and barrels; that this flour had been marketed thus by complainant in the State of Alabama for the preceding twelve years, during which time, by maintaining a high and uniform quality, by expensive advertising, and by diligent work of its representatives, it had built up a large and lucrative market, with annual sales of more than $175,000 of Tea Rose flour in that State, and had established a valuable reputation for the name "Tea Rose" and the distinctive wrappings in Alabama and other States, particularly Georgia and Florida; that until shortly before the commencement of the suit complainant's Tea Rose flour was the only flour made, sold, or offered for sale under that name in Butler County or elsewhere in the State of Alabama, and the name "Tea Rose" had represented and stood for complainant's flour; and that recently the Steeleville Milling Company, of Steeleville, Illinois, had, through Metcalf's agency, been marketing in Alabama, and particularly in Butler County, flour of its manufacture, in packages and wrappings substantially identical with complainant's and bearing a design containing three roses and the name "Tea Rose" upon the labels, in a manner calculated to deceive and in fact deceptive to purchasers, thereby threatening pecuniary loss to complainant exceeding $3,000 in amount and destroying the prestige of complainant's "Tea Rose" flour and damaging its trade therein.

Defendant's answer denied all attempts to deceive purchasers, and further denied complainant's right to the exclusive use of the words "Tea Rose" or the picture of a rose as a trade-mark; averred that long prior to complainant's first use of it, and as early as the year 1872, the name had been adopted, appropriated, and used as

a trade-mark for flour by the firm of Allen & Wheeler, of Troy, Ohio, and used by it and its successor, The Allen & Wheeler Company, continuously as such; and alleged that the Steeleville Milling Company had used its "Tea Rose" brand for more than sixteen years last past, and as early as the year 1899 had sold flour in Alabama under that label.

Upon consideration of the bill and answer and affidavits submitted by the respective parties, the District Court granted a temporary injunction restraining Metcalf from selling flour labeled "Tea Rose," manufactured by the Steeleville Company or any person, firm, or corporation other than the Hanover Company, at Greenville, or at any other place in the Middle District of Alabama. Upon appeal, the Circuit Court of Appeals for the Fifth Circuit reversed this decree and remanded the cause with directions to dismiss the bill. 204 Fed. Rep. 211. A writ of certiorari was then allowed by this court.

In No. 30, The Allen & Wheeler Company, a corporation of the State of Ohio, manufacturing flour at the City of Troy in that State, filed a bill against the Hanover Star Milling Company on May 23, 1912, in the United States District Court for the Eastern District of Illinois, averring that in or before the year 1872 the firm of Allen & Wheeler, then engaged in the manufacture of flour at Troy, adopted as a trade-mark for designating one of its brands the words "Tea Rose," and from thence until the year 1904 continuously used that trade-mark by placing it upon sacks, barrels, and packages containing the brand and quality of flour designated by that term and sold throughout the United States; that in 1904 the Allen & Wheeler Company was incorporated and took over the mills, machinery, stock, trade-mark, and good-will of the firm, since which time the corporation had continued to use the trade-mark upon flour of its manufacture, and had distributed and sold such flour in the mar-

kets of the United States, whereby the words "Tea Rose" had become the common-law trade-mark of the Allen & Wheeler Company; that recently it had learned that the Hanover Star Milling Company had adopted the words "Tea Rose" as designating a brand of flour manufactured by it, and, notwithstanding notice of complainant's rights, was persisting in the sale of its flour under that name and threatening to continue so to do; and that defendant had sold large quantities of Tea Rose flour, particularly in the markets of the States of Alabama, Florida, and Mississippi, with large gross sales, and profits approximating $5,000 per year for the past five years, causing damage and loss to complainant in excess of $3,000. An injunction and an accounting of profits were prayed. Upon this bill, a demurrer filed by the Hanover Company, and affidavits presented by both parties, the District Court granted a temporary injunction restraining the use of the words "Tea Rose" as a trade-mark for flour, without territorial restriction. The Circuit Court of Appeals for the Seventh Circuit reversed this decree, and remanded the cause to the District Court for further proceedings not inconsistent with its opinion. *Hanover Star Milling Co.* v. *Allen & Wheeler Co.*, 208 Fed. Rep. 513. An appeal was taken to this court, and a writ of certiorari was subsequently granted. The appeal must be dismissed for want of jurisdiction, and the case will be disposed of under the writ of certiorari.

No question is raised respecting the propriety of passing upon the questions at issue on a review of decisions rendered upon applications for temporary injunction. Both District Courts granted such injunctions, and both Circuit Courts of Appeals reversed upon grounds that went to the merits. These courts differed upon fundamental questions, and it was because of this that the writs of certiorari were allowed, the situation being such that it was deemed proper to allow them before final decrees

were made, notwithstanding the general rule to the contrary. *American Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 378, 384; *The Three Friends*, 166 U. S. 1, 49; *The Conqueror*, 166 U. S. 110, 113; *Denver* v. *N. Y. Trust Co.*, 229 U. S. 123, 133.

In both cases it was shown without dispute that the firm of Allen & Wheeler adopted and used the words "Tea Rose" as a trade-mark for one kind or quality of flour manufactured by it as early as the year 1872, and continued that use until the year 1904, when the Allen & Wheeler Company was incorporated and took over the mills, machinery, stock, trade-mark, and good-will of the firm and succeeded to its business. But there is nothing to show the extent of such use or the markets reached by it, except that in the year 1872 Allen & Wheleer sold three lots of 25 barrels each to a firm in Cincinnati, Ohio, and one lot of 100 barrels to a firm in Pittsburgh, Pennsylvania; that in the early 70's another firm in Pittsburgh was a customer for this brand; and that in the later 70's a firm in Boston, Massachusetts, was a customer for the same brand. As to the Allen & Wheeler Co., there are affidavits stating in general terms that since its incorporation in 1904, and "continuously down to the present time," the company has used the brand "Tea Rose" for flour; but there is a remarkable absence of particular statements as to time, place, or circumstances; in short, no showing whatever as to the extent of the use or the markets reached. There is nothing to show that the Allen & Wheeler "Tea Rose" flour has been even advertised in Alabama or the adjoining States, and there is clear and undisputed proof that it has not been sold or offered for sale or known or heard of by the trade in Alabama, Mississippi, or Georgia. In No. 30, there is uncontradicted proof that the Allen & Wheeler Co. is selling flour in Alabama and Georgia, but under the brands "Eldean Patent" and "Trojan Special."

In both suits, the Hanover Star Milling Company introduced affidavits fairly showing that shortly after its incorporation in the year 1885 it adopted for one of its brands of flour the name "Tea Rose," and adopted for the package or container, whether sack or barrel, a label bearing the name "Tea Rose" and the design already referred to; and that this trade-mark was adopted and used in good faith without knowledge or notice that the name "Tea Rose" had been adopted or used by the Allen & Wheeler firm, or by anybody else. In 1904 the Hanover Company began and has since prosecuted a vigorous and expensive campaign of advertising its Tea Rose flour, covering the whole of the State of Alabama, and parts of Mississippi, Georgia, and Florida, employing many ingenious and interesting devices that are detailed in the proofs, with the result that at the commencement of the litigation its sales of Tea Rose flour in these markets amounted to more than $150,000 a year, the Hanover Star Milling Company has come to be known as the Tea Rose mill, the reputation of the mill is bound up with the reputation of Tea Rose flour, and "Tea Rose" in the flour trade in the territory referred to means flour of the Hanover Company's manufacture. There is nothing to show any present or former competition in Tea Rose flour between the latter company and the Allen & Wheeler firm or corporation, or that either party has ever advertised that brand of flour in territory covered by the activities of the other.

Metcalf's purchases of competing Tea Rose flour, which gave rise to the suit brought by the Hanover Company against him, were made from the Steeleville Milling Company, an Illinois corporation, which appears to have adopted the name and design of a tea rose for flour in the year 1895.

It should be added that, so far as appears, none of the parties here concerned has registered the trade-mark

under any act of Congress or under the law of any State. Nor does it appear that in any of the States in question there exists any peculiar local rule, arising from statute or decision. Hence, the cases must be decided according to common-law principles of general application.

Interesting and important questions are raised concerning the territorial extent of trade-mark rights. In behalf of the Hanover Company it is, in effect, insisted: (a) that the failure of the Allen & Wheeler Company and its predecessors to enter the south-eastern territory with their Tea Rose flour, and the fact that such flour has been and is wholly unknown there under that name, disentitle it to interfere with the Hanover Company's trade established in good faith in that territory under the same mark; (b) that the same considerations entitle Hanover to affirmative trade-mark rights of its own, enforceable against the Steeleville Company and everybody else over whom it has priority in that territory; and (c) that Hanover is entitled to relief against Steeleville and against Metcalf as its agent, upon the ground of unfair competition in trade regardless of the trade-mark right. An affirmative answer to the first proposition will decide the Allen & Wheeler case (No. 30) in favor of Hanover, and an affirmative answer to the third proposition will decide the Metcalf case (No. 23) in favor of Hanover, irrespective of the disposition that might be made of the second proposition. In view of possible consequences to the rights of parties not before the court, it is desirable to limit the range of our decision as much as practicable, especially as the proofs now before us are incomplete and in some respects unsatisfactory.

It will be convenient to dispose first of No. 30. Here the bill is rested upon alleged trade-mark infringement, pure and simple, and no question of unfair competition is involved. The decision of the Court of Appeals for the Seventh Circuit in favor of the Hanover Company and

against the Allen & Wheeler Company was rested upon the ground that although the adoption of the Tea Rose mark by the latter antedated that of the Hanover Company, its only trade, so far as shown, was in territory north of the Ohio River, while the Hanover Company had adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that anybody else was using or had used those words in such a connection, and during many years it had built up and extended its trade in the southeastern territory, comprising Georgia, Florida, Alabama, and Mississippi, so that in the flour trade in that territory the mark "Tea Rose" had come to mean the Hanover Company's flour, and nothing else. The court held in effect that the right to protection in the exclusive use of a trade-mark extends only to those markets where the trader's goods have become known and identified by his use of the mark; and because of the non-occupancy by the Allen & Wheeler Company of the southeastern markets it had no ground for relief in equity. Let us test this by reference to general principles.

The redress that is accorded in trade-mark cases is based upon the party's right to be protected in the good-will of a trade or business. The primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed. Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are deb[illegible]om applying the same mark to goods of the same des[illegible]tion, because to do so, would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy. Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the

wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *McLean* v. *Fleming*, 96 U. S. 245, 251; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53; *Menendez* v. *Holt*, 128 U. S. 514, 520; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 546.

This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition. *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674; *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. Rep. 369, 372; *Cohen* v. *Nagle*, 190 Massachusetts, 4, 8, 15; 5 A. & E. Ann. Cas. 553, 555, 558.

Common-law trade-marks, and the right to their exclusive use, are of course to be classed among property rights, *Trade-mark Cases*, 100 U. S. 82, 92, 93; but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good-will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality. As was said in the same case (p. 94), the right grows out of use, not mere adoption. In the English courts it often has been said that there is no property whatever in a trade-mark, as such. *Per* Ld. Langdale, M. R., in *Perry* v. *Truefitt*, 6 Beav. 73; *per* Vice Chancellor Sir Wm. Page Wood (afterwards Ld. Hatherly), in *Collins Co.* v. *Brown*, 3 Kay & J. 423, 426; 3 Jur. N. S. 930; *per* Ld. Herschell in *Reddaway* v. *Banham*, A. C. 1896, 199, 209. But since in the same cases the courts recognized the right of the party to the exclusive use of marks adopted to indicate goods of his manufacture, upon the ground that "A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be

allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person" (6 Beav. 73); it is plain that in denying the right of property in a trade-mark it was intended only to deny such property right except as appurtenant to an established business or trade in connection with which the mark is used. This is evident from the expressions used in these and other English cases. Thus, in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. Cas. 518, 524, Vice Chancellor Sir Wm. Page Wood said: "This court has taken upon itself to protect a man in the use of a certain trade-mark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark."

In short, the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business. The same rule prevails generally in this country, and is recognized in the decisions of this court already cited. See also *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18, 20; *Levy* v. *Waitt*, 61 Fed. Rep. 1008, 1011; *Macmahan Co.* v. *Denver Mfg. Co.*, 113 Fed. Rep. 468, 471, 475; *Congress Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526, 551; *Weston* v. *Ketcham*, 51 How. Pr. 455, 456; *Candee* v. *Deere*, 54 Illinois, 439, 457; *Avery & Sons* v. *Meikle*, 81 Kentucky, 73, 86.

Expressions are found in many of the cases to the effect that the exclusive right to the use of a trade-mark is founded on priority of appropriation. Thus, in *Canal Co.* v. *Clark*, 13 Wall. 311, 323, reference is made to "the first appropriator"; in *McLean* v. *Fleming*, 96 U. S. 245, 251, to "the person who first adopted the stamp"; in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53, the expression is "any symbol or device, not previously appropriated, which will distinguish," etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.

Of course, if the symbol or device is already in general use, employed in such a manner that its adoption as an index of source or origin would only produce confusion and mislead the public, it is not susceptible of adoption as a trade-mark. Such a case was *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 464, affirming 40 Fed. Rep. 676, where it appeared that before complainant's adoption of the disputed word as a brand for its flour the same word was used for the like purpose by numerous mills in different parts of the country.

That property in a trade-mark is not limited in its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs, is true in a limited sense. Into whatever markets the use of a trade-mark has extended, or its meaning has become

known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trade-mark, good in the markets where it has been employed, can monopolize markets that his trade has never reached and where the mark signifies not his goods but those of another. We agree with the court below (208 Fed. Rep. 519) that "Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

To say that a trade-mark right is not limited in its enjoyment by territorial bounds, is inconsistent with saying that it extends as far as the sovereignty in which it has been enjoyed. If the territorial bounds of sovereignty do not limit, how can they enlarge such a right? And if the mere adoption and use of a trade-mark in a limited market shall (without statute) create an exclusive ownership of the mark throughout the bounds of the sovereignty, the question at once arises, "What sovereignty?" So far as the proofs disclose, the Allen & Wheeler mark has not been used at all, is not known at all in a market sense, within the sovereignty of Alabama, or the adjacent States, where the controversy with the Hanover Star Milling Company arose. And so far as the controversy concerns intrastate distribution as distinguished from interstate trade, the subject is not within the sovereign powers of the United States. *Trade-Mark Cases*, 100 U. S. 82, 93.

We are referred to an expression contained in the opinion of this court in *Kidd* v. *Johnson*, 100 U. S. 617, 619: "The right to use the trade-mark is not limited to any place, city, or State, and, therefore, must be deemed

to extend everywhere." But a reference to the facts of the case, and the context, shows that the language was not used in the sense attributed to it in the argument. The question presented for decision related to the ownership of a trade-mark used by complainants (Johnson & Co.) on packages and barrels containing whiskey, manufactured and sold by them in Cincinnati, and this turned in part upon the force to be given to a written transfer executed by one Pike and delivered to complainant's predecessors in business in connection with a sale of the distillery and its appurtenances, which were Pike's individual property. Kidd, the defendant, claimed the right to use the same mark as surviving partner of a firm of which Pike had been a member. The court, speaking by Mr. Justice Field, said (p. 619): "That transfer was plainly designed to confer whatever right Pike possessed. It, in terms, extends the use of the trade-mark to Mills, Johnson & Co. and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trade-mark would be of no service in distinguishing the whiskey of the manufacture in Cincinnati; and thus the company would lose all the benefit arising from the reputation the whiskey there manufactured had acquired in the market. The right to use the trade-mark is not limited to any place, city, or State, and, therefore, must be deemed to extend everywhere." This does not import that the trade-mark right assigned was greater in extent than the trade in which it was used. The record in the case showed that complainant's trade had been extended to New Orleans, and the controversy arose out of sales made there by defendants as licensees of Kidd. It was admitted in the answer that they had sold whiskey in competition with that of complainants at New Orleans, and under the same trade-mark, and the case was by stipulation treated as a test case to settle whether Johnson & Co. or Kidd had the

exclusive right, or whether they had a joint right, to the use of the mark.

We are also referred to *Derringer* v. *Plate*, 29 California, 292, 295, in which it was said by the court: "The manufacturer at Philadelphia who has adopted and uses a trade-mark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture." In that case plaintiff averred that he was a resident of Philadelphia, and upwards of thirty years before the action invented a pistol and adopted as a trade-mark for it the words "Derringer, Philadel.," which was and ever since had been his trade-mark, and which he had caused to be stamped on the breech of all pistols manufactured and sold by him; and that the defendant since 1858 had been engaged in the manufacture of pistols at San Francisco similar to plaintiff's, on the breech of which he had stamped plaintiff's trade-mark, etc. The report of the case shows (p. 294) that the only question presented was whether the California statute of 1863 concerning trade-marks had repealed or abrogated the remedies afforded by the common law in trade-mark cases. This was answered in the negative, and in the course of the reasoning the court said, p. 295: "The right is not limited in its enjoyment by territorial bounds, but, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same, the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs;" continuing with what we have first quoted. Although not expressly stated, it is implicit in the report that plaintiff's pistols were on the market in San Francisco, and his trade-mark known there and imitated by defendant for that very reason. It was such a mark as could not be accidentally hit upon.

It results from the general principles thus far discussed that trade-mark rights, like others that rest in user, may

be lost by abandonment, non-user, laches, or acquiescence. Abandonment, in the strict sense, rests upon an intent to abandon; and we have no purpose to qualify the authority of *Saxlehner* v. *Eisner*, 179 U. S. 19, 31, to that effect. As to laches and acquiescence, it has been repeatedly held, in cases where defendants acted fraudulently or with knowledge of plaintiffs' rights, that relief by injunction would be accorded although an accounting of profits should be denied. *McLean* v. *Fleming*, 96 U. S. 245, 257; *Menendez* v. *Holt*, 128 U. S. 514, 523; *Saxlehner* v. *Eisner*, 179 U. S. 19, 39. So much must be regarded as settled. But cases differ according to their circumstances, and neither of those cited is in point with the present. Allowing to the Allen & Wheeler firm and corporation the utmost that the proofs disclose in their favor, they have confined their use of the "Tea Rose" trade-mark to a limited territory, leaving the south-eastern States untouched. Even if they did not know—and it does not appear that they did know—that the Hanover Company was doing so, they must be held to have taken the risk that some innocent party might, during their forty years of inactivity, hit upon the same mark and expend money and effort in building up a trade in flour under it. If, during the long period that has elapsed since the last specified sale of Allen & Wheeler "Tea Rose"—this was "in the later 70's"—that flour has been sold in other parts of the United States, excluding the south-eastern States, no clearer evidence of abandonment by non-user of trade-mark rights in the latter field could reasonably be asked for. And when it appears, as it does, that the Hanover Company in good faith and without notice of the Allen & Wheeler mark has expended much money and effort in building up its trade in the south-eastern market, so that "Tea Rose" there means Hanover Company's flour and nothing else, the Allen & Wheeler Company is estopped to assert trade-mark infringement as to that territory.

The extent and character of that territory, and its remoteness from that in which the Allen & Wheeler mark is known, are circumstances to be considered. Alabama alone—to say nothing of the other States in question—has an area of over 50,000 square miles, and by the census of 1910 contained a population of more than 2,000,000. Its most northerly point is more than 250 miles south of Cincinnati, which is the nearest point at which sales of Allen & Wheeler "Tea Rose" are shown to have been made, and these at a time antedating by approximately forty years the commencement of the present controversy. We are not dealing with a case where the junior appropriator of a trade-mark is occupying territory that would probably be reached by the prior user in the natural expansion of his trade, and need pass no judgment upon such a case. Under the circumstances that are here presented, to permit the Allen & Wheeler Company to use the mark in Alabama, to the exclusion of the Hanover Company, would take the trade and goodwill of the latter company—built up at much expense and without notice of the former's rights—and confer it upon the former, to the complete perversion of the proper theory of trade-mark rights.

The case is peculiar in its facts; and we have found none precisely like it. The recent case of *Rectanus Co.* v. *United Drug Co.* (C. C. A. 6th), 227 Fed. Rep. 545, 549, 553, is closely analogous.

We come now to No. 23. The Court of Appeals (204 Fed. Rep. 211) denied relief to the Hanover Company against Metcalf under the head of trade-mark infringement partly upon the ground that Allen & Wheeler were the first appropriators of the mark, and that it had been continuously used by that firm and its successor down to the time of the suit, but principally upon the ground that, irrespective of whether this use was so general or continuous as to exclude other appropriation, the evidence

showed a use of the same brand by the Steeleville Company commencing in the year 1895 and carried on in the States of Illinois, Tennessee, Indiana, Arkansas and Mississippi, with occasional shipments into Alabama; a use so extensive and continuous as to exclude the claim of the Hanover Company to either first appropriation or exclusive use in any of the territory from which it sought to expel Metcalf; and that "the Steeleville Milling Company's first use and its extensive and continuous use established by the evidence in the territory of its selection gave it the unqualified right to extend unhampered its trade in flour under the Tea Rose brand into any part of the United States, and that too without incurring the legal odium of unfair competition." Relief under the head of unfair competition was denied upon the ground that the Hanover Company had not clearly shown that it had established by prior adoption the exclusive right to dress its goods in the manner claimed.

Upon the question of trade-mark rights as between the Hanover and the Steeleville companies (leaving Allen & Wheeler out of the question), the proofs are somewhat conflicting. There is evidence that Hanover's use of the Tea Rose brand antedated the year 1893, and probably began as early as 1886. The extent and particulars of such use, prior to the year 1903, are not made to appear. On the other hand, Steeleville appears to have adopted the brand in the year 1895, and used it in trade in Illinois, Tennessee, Mississippi, Louisiana, and Arkansas; the extent and particulars of the use not being shown. Sharp competition appears to have been carried on between the two companies in selling flour under the Tea Rose brand at Meridian, Mississippi, in the years 1903 to 1905, with the result that the Hanover Company, claiming that its use of the mark for flour had antedated that of the Steeleville Company, succeeded in obtaining a favorable decision in an informal arbitration by officials of the Millers

National Federation; and for this or some other reason Steeleville appears to have retired and left the Hanover Company in complete control of the Meridian market. Aside from the business done by the Steeleville Company at Meridian, there is no proof of business done by it in the south-eastern States, except that it made an isolated sale of Tea Rose flour to a merchant at Whistler, Alabama, in the year 1899, the quantity not stated, and two isolated sales, involving a small quantity in each case, one to a retailer in Tupelo, Mississippi, in the year 1910, the other to a retailer in West Point, Mississippi, in January, 1912.

As we regard the proofs, they do not sustain the view of the Circuit Court of Appeals for the Fifth Circuit either as to first use or as to extensive, continuous, or exclusive use of the Tea Rose brand by the Steeleville Company, and there is nothing in the history of the use of the brand in the disputed territory to deprive the Hanover Company of its right to be protected at least against unfair competition at the hands of the Steeleville Company or of Metcalf as its representative.

That there was such unfair competition, commenced by Metcalf shortly before the bringing of the suit, the proofs clearly show. Repeating that since the year 1904 the Hanover Company had extensively advertised its Tea Rose flour throughout the State of Alabama and parts of Mississippi, Georgia, and Florida, with the result that its sales of that flour in those markets amounted to more than $150,000 a year, while the Hanover Star Milling Company had come to be known as the Tea Rose mill, and the words "Tea Rose" in the flour trade in that territory meant flour of the Hanover Company's manufacture and nothing else, and that, except for isolated sales in Mississippi in 1910 and 1912, already mentioned, no Tea Rose flour other than that of the Hanover Company had been sold in that territory for a number of

years, it further should be stated that Hanover Tea Rose was distributed in Butler County and adjoining counties in Alabama by the McMullan Grocery Company, whose place of business was at Greenville. They had built up a large trade for this flour in Butler County and the neighboring counties of Conecuh, Covington, Lowndes, and Crenshaw. The McMullan Company had the exclusive sale of the Hanover Company's Tea Rose flour, so that Metcalf, who likewise did business at Greenville, was unable to procure it for distribution to his customers. A short time before the suit was commenced, however, he announced to the public and the trade in Butler County that he had secured Tea Rose flour, and on receiving a consignment from the Steeleville Company, which was labeled "Tea Rose" and put up in packages closely resembling those used by the Hanover Company—so closely that, according to the undisputed evidence, they are "calculated to and do in fact deceive the ordinary and casual purchaser of flour into the belief that he is purchasing the article of that name manufactured by the said Hanover Star Milling Company"—Metcalf put large banners on his mules and dray advertising to the public that he had received a shipment of Tea Rose flour, and that it was "Steeleville Milling Company's Tea Rose flour, best quality." Metcalf, and his traveling salesman who marketed the greater part of this consignment, and several parties who purchased it in lots of from one to ten barrels, deposed that it was not sold under a representation that it was manufactured by the Hanover Company, but, on the contrary, that it was Tea Rose flour manufactured by the Steeleville Milling Company. But Metcalf's purpose to take advantage of the reputation of the Hanover Company's Tea Rose flour is so manifest, and the tendency of the similarity of the brand and accompanying design, and of the make-up of the packages, to mislead ultimate consumers is so evident, that it seems to

us a case of unfair competition is made out. The circumstances strongly indicate a fraudulent intent to palm off the Steeleville Tea Rose flour upon customers as being the same as the Tea Rose flour made by complainant, the reputation of which is shown to be so well established. The mere substitution of "Steeleville" in the place of "Hanover" on the labels is not convincing either that the intent is innocent or that the result will be innocuous, since it is accompanied with the words "Tea Rose," (shown to have acquired a secondary meaning), and with the distinctive wrapping, both indicative in that market of complainant's flour. Complainant is thus shown to be entitled to an injunction against Metcalf, irrespective of its claim to affirmative trade-mark rights in that territory. *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 566; *Elgin Nat'l Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674. Adjudication of the latter claim may be made, if necessary, upon final hearing, when the proofs will presumably be more complete than they now are.

It results that the decree under review in No. 23 should be reversed, and the cause remanded for further proceedings in accordance with this opinion, and that the decree in No. 30 should be affirmed.

Decree in No. 23 reversed.
Appeal in No. 30 dismissed.
Decree in No. 30 affirmed.

MR. JUSTICE HOLMES concurring.

I am disposed to agree that the decree dismissing the bill of the Hanover Star Milling Company should be reversed and that the decree denying a preliminary injunction to the Allen and Wheeler Company should be affirmed, and I agree in the main with the reasoning of the court, so far as it goes. But I think it necessary to go farther even on the assumption that we are dealing with

the question of trade-marks in the several States only so far as commerce among the States is not concerned. The question before us, on that assumption, is a question of state law, since the rights that we are considering are conferred by the sovereignty of the State in which they are acquired. This seems to be too obvious to need the citation of authority, but it is a necessary corollary of the *Trade Mark Cases*, 100 U. S. 82. Those cases decided that Congress cannot deal with trade-marks as used in commerce wholly between citizens of the same State. It follows that the States can deal with them, as in fact they sometimes do by statute, Mass. Rev. Laws, c. 72, §§ 2, 3, and when not by statute by their common law.

As the common law of the several States has the same origin for the most part and as their law concerning trade-marks and unfair competition is the same in its general features, it is natural and very generally correct to say that trade-marks acknowledge no territorial limits. But it never should be forgotten, and in this case it is important to remember, that when a trade-mark started in one State is recognized in another it is by the authority of a new sovereignty that gives its sanction to the right. The new sovereignty is not a passive figurehead. It creates the right within its jurisdiction, and what it creates it may condition, as by requiring the mark to be recorded, or it may deny. The question then is what is the common law of Alabama in cases like these. It appears to me that if a mark previously unknown in that State has been used and given a reputation there, the State well may say that those who have spent their money innocently in giving it its local value are not to be defeated by proof that others have used the mark earlier in another jurisdiction more or less remote. Until I am compelled to adopt a different view I shall assume that that is the common law of the State. It appears to me that the foundation of the right as stated by the court requires that conclusion. See

further *Chadwick* v. *Covell*, 151 Massachusetts, 190, 193, 194. Those who have used the mark within the State are those who will be defrauded if another can come in and reap the reward of their efforts on the strength of a use elsewhere over which Alabama has no control.

I think state lines, speaking always of matters outside the authority of Congress, are important in another way. I do not believe that a trade-mark established in Chicago could be used by a competitor in some other part of Illinois on the ground that it was not known there. I think that if it is good in one part of the State it is good in all. But when it seeks to pass state lines it may find itself limited by what has been done under the sanction of a power coördinate with that of Illinois and paramount over the territory concerned. If this view be adopted we get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them. We have sharp lines drawn upon the fundamental consideration of the jurisdiction originating the right. In most cases the change of jurisdiction will not be important because the new law will take up and apply the same principles as the old, but when, as here, justice to its own people requires a State to set a limit, it may do so, and this court cannot pronounce its action wrong.

EATON, TRUSTEE IN BANKRUPTCY OF LUKE, *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE OF LEIGHTON.

ERROR TO THE SUPREME COURT OF THE STATE OF MASSACHUSETTS.

No. 466. Motion to dismiss or affirm submitted February 28, 1916.—Decided March 13, 1916.

Trusts for life with income to be free from interference or control of creditors of the beneficiary are in Massachusetts valid and effective against creditors, and under certain conditions, against assignees in insolvency and trustees in bankruptcy.

The policy of the Bankruptcy Act is to respect state exemptions.

A trust fund established by a will, the whole of the income to be paid during life of the beneficiary with such portion of the principal as shall make the annual amount to be paid at least a stated sum, said income to be free from interference or control of creditors, *held*, in this case, following the decision of the highest court of Massachusetts, not to pass to the trustee in bankruptcy of the beneficiary under § 70 a (5) of the Bankruptcy Act.

THE facts, which involve the construction and application of § 70 a (5) of the Bankruptcy Act, and of the rights of the life tenant in a trust fund created under the laws of Massachusetts, are stated in the opinion.

Mr. Raymond H. Oveson, *Mr. Alexander Kendall* and *Mr. Matthew Hale* for defendant in error in support of the motion.

Mr. Gilbert E. Kemp for plaintiff in error in opposition thereto.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill for instructions, brought by the Trust Company, the principal defendant in error, to ascertain whether a fund bequeathed to it in trust for Mrs. Luke,

codefendant in error, passed to her trustee in bankruptcy. The bequest was of seventy-five thousand dollars, "The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least Three Thousand Dollars a year during her life, said income to be free from the interference or control of her creditors." It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh*, 153 Massachusetts, 311. *Munroe* v. *Dewey*, 176 Massachusetts, 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assignable, and that therefore it passed under § 70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt "could by any means have transferred." The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts, 484.

If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass. There would be an analogy at least with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit, § 70 a (3), and there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the

fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. *Ames* v. *Clarke*, 106 Massachusetts, 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress* v. *Allen*, 195 Massachusetts, 226. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether if that power were absolute the restriction still should be upheld as in case of a statutory exemption that leaves the bankrupt free to convey his rights it is unnecessary to decide.

The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson*, 198 Massachusetts, 142, 146. *Lathrop* v. *Merrill*, 207 Massachusetts, 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page* v. *Edmunds*, 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton*, 91 U. S. 716. *Shelton* v. *King*, 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule.

Decree affirmed.

CAREY *v.* DONOHUE, TRUSTEE IN BANKRUPTCY OF HUMPHREYS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 179. Argued January 17, 1916.—Decided March 13, 1916.

The reference to the requirement for record in § 60 of the Bankruptcy Act is not to a requirement for the protection of *bona fide* purchasers without notice and who are outside the purview of the act, but to a requirement of record for protection of creditors and persons interested in the bankrupt's estate and in whose behalf or place the trustee is entitled to act; and where there is no such requirement and the transfer was made more than four months before the filing of the petition there can be no recovery under § 60.

A provision in a state statute that instruments conveying real estate shall until filed for record be deemed fraudulent, only so far as relates to subsequent *bona fide* purchasers without knowledge or notice, as in § 8543, General Code of Ohio, is not a requirement that the instrument be recorded within the meaning of § 60 of the Bankruptcy Act.

The amendment of February 5, 1903, to § 60 of the Bankruptcy Act as finally enacted did not make § 60 so conform to § 3 b that the same rule was established for computing the time within which a petition might be filed after a transfer giving a preference, and the time within which under § 60 the trustee might commence an action to recover property preferentially transferred.

The legislative history of the amendment of February 5, 1903, shows that Congress by the final omission of the provision in regard to possession, originally included in the bill as it passed the House of Representatives but struck out in the Senate, deliberately refused to make such conformity; and the courts cannot supply by construction that which Congress has clearly shown its intention to omit.

213 Fed. Rep. 1021, reversed.

THE facts, which involve the construction and application of § 60 of the Bankruptcy Act and the validity of a judgment setting aside transfers made more than four months before the petition, are stated in the opinion.

Mr. Morison R. Waite, with whom *Mr. John Randolph Schindel* was on the brief, for appellant.

Mr. E. R. Donohue, with whom *Mr. David Davis* and *Mr. W. G. Durrell* were on the brief, for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt of certain real estate. Upon appeal from a decree in favor of the trustee, it was held by the Circuit Court of Appeals that the case had been tried, and the decree was based, upon the theory of preference voidable under the Bankruptcy Act, and for the purpose of appropriate amendment to conform the bill to the proof, the decree was reversed and the cause was remanded. 209 Fed. Rep. 328. The amendment was made accordingly, and the decree was reëntered and affirmed. 213 Fed. Rep. 1021.

The petition in involuntary bankruptcy was filed on January 3, 1911, and the adjudication was had on January 24, 1911. The following facts appear from the findings: On August 6, 1910, John E. Humphreys (the bankrupt) executed and delivered to Walter J. Carey (the appellant) the deed in question. It was left for record on November 15, 1910, with the recording officer of the proper county, and was recorded. Humphreys was insolvent at the time of the execution of the deed, and Carey at that time had reasonable cause to believe that such transfer to him if made would effect a preference, being given in payment of an antecedent debt. On December 31, 1910, Carey conveyed the property to innocent purchasers, this deed being left for record on January 3, 1911. It was held that the latter conveyance placed the property itself beyond the reach of the court; and judgment was given in favor of the trustee and against Carey for the

value of the property as found by a jury, with provision for the payment by the trustee to the wife of the bankrupt of the estimated value of her inchoate right of dower.

We are not concerned with the provisions of the Ohio statute relating to preferences (General Code, §§ 11104, 11105),—a statute which provides a different test of liability from that of § 60 [1] of the Federal Act pursuant to which the recovery was had. (209 Fed. Rep. 331, 332.) The sole question presented for the consideration of this court is whether the deed executed by the bankrupt was one which was 'required' to be recorded within the meaning of this section. If it was not, there could be no recovery of the property under § 60, as the deed was

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[1] The applicable provisions of § 60 are as follows:

"SEC. 60. PREFERRED CREDITORS—a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

executed and delivered more than four months before the petition in bankruptcy was filed. If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover, as the recording was within the four months' period and the other conditions of recovery were satisfied.

The provision for the recording of the deed is found in § 8543 of the General Code of Ohio, which follows the requirement for the recording of mortgages and powers of attorney. The section reads:

"Section 8543. All other deeds and instruments of writing for the conveyance or encumbrance of lands, tenements or hereditaments executed agreeably to the provisions of this chapter shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent so far as relates to a subsequent *bona fide* purchaser having, at the time of the purchase, no knowledge of the existence of such former deed or instrument."

Referring to this section, the Supreme Court of Ohio said in *Dow* v. *Union National Bank*, 87 Oh. St. 173, 181: "This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record, and there being mere neglect, unaccompanied by any fraudulent conduct or representation on the part of the grantee, no right can accrue to anyone other than such *bona fide* purchaser." Accordingly, it was held that the mere failure to record a deed did not render it invalid as to creditors of the grantor although they became such on the faith of his representation that he was still the owner of the property conveyed. This decision applied the ruling in *Wright* v. *Franklin Bank*, 59 Oh. St. 80, 92, 93, where it was said: "Lands held by a properly executed, but unrecorded deed, are also free from the debts of the grantor, whether attempted

to be reached in an assignment for the benefit of creditors made by him, or upon an attachment, judgment or execution against him. The title under such a deed is good as against everything except a subsequent *bona fide* purchaser without notice. . . . Mortgages so executed, whether on an estate in real property or on only an interest therein, take effect from the time of the delivery to the recorder, and deeds so executed, conveying the estate or only an interest therein, that is, an equity, take effect from delivery, except as against subsequent *bona fide* purchasers without notice, and as against such the deed must be also recorded." In the present case, the Court of Appeals was satisfied that in equity the instrument (which was absolute in form) should be treated as a mortgage, but the court did not think this to be important because of the holding of the Ohio court that an instrument in this form, "unlike a legal mortgage, operates upon delivery to transfer title and so is required to be recorded as a deed." 209 Fed. Rep. 334, 335; *Kemper* v. *Campbell*, 44 Oh. St. 210, 218; *Wright* v. *Franklin Bank*, 59 Oh. St. 95; *Cole* v. *Merchants' National Bank*, 15 Ohio C. C. Rep. (N. S.) 315, 347.

Under these decisions, then, we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt, whether a general creditor, or a lien creditor, or a judgment creditor with execution returned unsatisfied; that is, as against any class of persons represented by the trustee or with whose 'rights, remedies, and powers' he was to be deemed to be vested. Bankruptcy Act, § 47a. This fact, the appellant contends, makes recovery impossible under § 60; while the appellees insist that the provision in the interest of subsequent *bona fide* purchasers constitutes a requirement of recording which entitles a trustee to recover for the benefit of creditors. With respect to the construction of the

clause in question, there has been diversity of opinion in the Circuit Courts of Appeals. In the Sixth, Seventh, and Eighth Circuits, the view has been taken that the word 'required' refers 'to the character of the instrument giving the preference' without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. See *Loeser* v. *Savings Bank* (C. C. A., Sixth), 148 Fed. Rep. 975, 979 (followed by the decision in the present case); *In re Beckhaus* (C. C. A., Seventh), 177 Fed. Rep. 141 (see *In re Sturtevant* (C. C. A., Seventh), 188 Fed. Rep. 196); *First National Bank* v. *Connett* (C. C. A., Eighth), 142 Fed. Rep. 33, 36; *Mattley* v. *Giesler* (C. C. A., Eighth), 187 Fed. Rep. 970, 971. A different conclusion has been reached in the Second, Fifth and Ninth Circuits. See *In re Boyd* (C. C. A., Second), 213 Fed. Rep. 774; *Meyer Drug Co.* v. *Pipkin Drug Co.* (C. C. A., Fifth), 136 Fed. Rep. 396; *In re McIntosh* (C. C. A., Ninth), 150 Fed. Rep. 546; also, *In re Hunt* (D. C., N. Y.), 139 Fed. Rep. 283.

In its original form, § 60 made no reference to record. 30 Stat. 562. The four months ran from the time of the giving of the preference and if this period had elapsed when the bankruptcy proceeding was instituted, there could be no recovery under § 60, whether the transfer had, or had not, been recorded. See *Humphrey* v. *Tatman*, 198 U. S. 91; *Rogers* v. *Page*, 140 Fed. Rep. 596, 599. But a different rule was established for computing the time within which a petition in bankruptcy might be filed. In § 3b, it was provided that the four months' period should not expire "until four months after (1) the date of the recording or registering of the transfer . . . when the act consists in having made a transfer . . . for the purpose of giving a preference . . . if by

law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer." 30 Stat. 546, 547. This distinction between the test of the right to institute bankruptcy proceedings and the test of the right to recover from one who had received a transfer alleged to be a preference lay in the terms of the act and could not rightly be ignored. It was urged that the result was to encourage secret preferential transactions; but the wisdom of the prescribed condition of recovery from the preferred creditor, and the advisability of conforming the provision of § 60 to that of § 3b was a matter for legislative, not judicial, consideration. To secure this conformity, an amendment to § 60 was proposed in Congress in the year 1903. As passed by the House of Representatives, it added to § 60a the following clause: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred." Cong. Rec., 57th Cong., 1st Sess., Vol. 35, Part 7, pp. 6938, 6943. The Senate struck from this proposed amendment all that follows the words "if by law such recording or registering is required," and as thus limited the amendment was adopted by Congress. Cong. Rec., 57th Cong., 2d Sess., Vol. 36, Part 1, p. 1036; Act of Feb. 5, 1903, c. 487, 32 Stat. 797, 799, 800; *In re Hunt*, 139 Fed. Rep. 286. There in no basis for the assumption that the words which the House of Representatives had desired to add were ultimately deemed to be surplusage, for these words had an obviously distinct significance and they had been included in § 3b which in this respect remained unchanged.

We cannot but regard the action of Congress as a deliberate refusal to conform the requirements of § 60 to those of § 3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit. It should also be observed that § 60 was again under consideration by Congress in the year 1910, and it was again amended; but the last sentence of § 60a, as inserted in 1903, was left unaltered. And the same conditional clause—"if by law recording or registering thereof is required"—was used in the amended subdivision b (*ante*, p. 432, *note*). Whatever argument is made for an extension of the clause, in order more completely to conform it to the language of § 3b, we must disregard as addressed to a matter solely of legislative policy.

As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which though valid as between the parties was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural and, we think, the intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of

the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act. See Sen. Rep., No. 691, 61st Cong., 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent *bona fide* purchasers without notice. These subsequent purchasers are entirely outside of the purview of the Bankruptcy Act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause "if by law recording or registering thereof is required" had any reference to requirements in the interest of persons of this description. The limitation of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, *alio intuitu*, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60.

In this view, the decree must be reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

PECOS & NORTHERN TEXAS RAILWAY COMPANY *v.* ROSENBLOOM.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 613. Submitted February 24, 1916.—Decided March 13, 1916.

If an employé of an interstate carrier is employed in interstate commerce when killed, the right of recovery against the carrier depends upon the Federal Employers' Liability Act, which only permits suits by a personal representative for the benefit of the surviving widow or husband and children if there be such; and, in view of the pleadings and testimony in this case, *held* that it was error for the trial court to refuse an instruction to the effect that if the employé was at the time of his death engaged in interstate commerce, the widow of deceased could not maintain an action against the employer for the benefit of herself, as next friend for her minor children, and for the use and benefit of parents of deceased.

141 S. W. Rep. 174, reversed.

THE facts, which involve the application and construction of the Federal Employers' Liability Act, are stated in the opinion.

Mr. J. W. Terry, Mr. Gardiner Lathrop, Mr. A. H. Culwell, Mr. Alexander Britton and *Mr. Evans Browne* for plaintiff in error.

Mr. James D. Williamson, Mr. H. H. Cooper and *Mr. J. A. Stanford* for defendant in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

In November, 1909, M. A. Rosenbloom was instantly killed by a ballast car being pushed by an engine at track No. 5 in the railway company's switch y-

Amarillo, Texas. Proceeding in behalf of herself, as next friend for her two minor children, and for the use and benefit of his parents, the deceased's widow instituted this suit for damages in the District Court, Potter County, Texas. The jury returned a verdict for seven thousand dollars—apportioned two thousand respectively to the widow and each child, and five hundred to each parent; judgment thereon was sustained by the Court of Civil Appeals (141 S. W. Rep. 174) and by the State Supreme Court.

Among other things the amended petition alleges: That Rosenbloom was employed by the railway as ticket clerk and required to be in and at the switch yard in order to take and preserve a record of numbers on outgoing cars and to seal those which needed it. That when the accident occurred a long freight train was leaving the yard on its regular run along switch track No. 4; as required by his duties, Rosenbloom was walking between tracks 4 and 5 and near the train observing and noting car numbers; while so engaged and exercising due care a ballast car, negligently pushed along track No. 3, struck him with great violence and caused his death.

It conclusively appears from the evidence that the freight train on track 4, consisted of thirty odd cars moving, with one exception, in interstate commerce. The petition declares that in pursuance of his duty deceased was taking the numbers of these cars; there was some direct evidence to the same effect; and certainly enough had been shown to support a finding that when killed he was engaged in interstate commerce. The trial court refused the following instruction:

"If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reason-

ably carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues."

Upon a clearly erroneous assumption that there was nothing on which to base such request, the Supreme Court approved its refusal. The record discloses no proper reason for thus denying plaintiff in error a right claimed under the Federal Employers' Liability Act. If when struck deceased was employed in interstate commerce, the right of recovery depended upon that Act; and it only permits suit by a personal representative for the benefit of surviving widow or husband and children if there be such. April 22, 1908 (c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291). It is unnecessary to take up other points presented by counsel; the purpose and effect of the Federal legislation has been much discussed in our recent opinions. *Pedersen* v. *Del., Lack. & West. R. R.*, 229 U. S. 146; *St. L. & San Fran. Ry.* v. *Seale*, 229 U. S. 156; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473; *Seaboard Air Line* v. *Horton*, 233 U. S. 492; *N. Y. Central R. R.* v. *Carr*, 238 U. S. 260; *Penna. Co.* v. *Donat*, 239 U. S. 50; *Southern Railway* v. *Lloyd*, 239 U. S. 496; *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556.

The judgment below is reversed and the cause remanded to the Supreme Court of Texas for further proceedings not inconsistent with this opinion.

Reversed.

UNITED STATES OF AMERICA *v.* UNITED STATES STEEL CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. —. Application submitted March 14, 1916.—Decided March 20, 1916.

This case having been commenced, and a large part of the testimony taken, printed and indexed and bound before Equity Rule 75 became operative, and the references to testimony in the opinion of the court below being directed to the testimony as contained in the bound volumes, *held* that the case is an exception to Equity Rule 75 and the testimony in its original form as contained in such printed volumes constitutes part of the record on appeal.

Sixty days' extension of time granted for filing in this court the record made up conformably to these views.

ON application for an order extending the time to docket the case and file the record in this court.

Mr. Assistant to the Attorney General Todd and *The Solicitor General* for the United States.

Mr. Richard V. Lindabury and *Mr. David A. Reed* for United States Steel Corporation.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The United States applied to the court below to extend the time for filing the record from March 15, 1916, the existing date, to July 1, to give it time to complete the reduction of the testimony to a narrative form conformably to Equity Rule 75. Equity Rule 75. Record on Appeal—Reduction and Preparation. Promulgated No-

vember 4, 1912, 226 U. S. 629, 671. The defendant opposed the request on the ground that there was doubt as to the possibility of adequately reducing the testimony and on the further ground that it desired the testimony brought up in original shape and because under all the circumstances of the case it should not be governed by Equity Rule 75. The court declined to pass upon the application but suggested that the parties submit to this court the question whether Equity Rule 75 was under the circumstances imperatively applicable, stating however that it had found great advantage in disposing of the case from having the original testimony before it and was of the opinion that a like advantage would be experienced by this court if the original testimony was brought up. The application before us was then made and is resisted on the grounds which were urged against it below.

The facts are these: The testimony was taken before an examiner and embraces 30 volumes containing 12,151 pages. Of these, 14 volumes or about 5969 pages embrace testimony taken before Equity Rule 75 became operative. By agreement between the parties as the testimony was taken it was printed and bound, and the requisite number of copies of the volumes are on hand to serve as part of the record in this court on the appeal. To facilitate the court below, digests and full indexes were prepared by counsel, and all the references to the testimony made by the court below in its opinion are directed to the testimony as contained in the bound volumes.

Under the facts which we have stated we are of opinion that the case is an exception to Equity Rule 75 and should not be controlled by it, and hence that the testimony in its original form as contained in the volumes already printed should constitute a part of the record on appeal, and therefore there is no reason to grant the request for time based upon the contrary assumption. While this is true, however, in order that there may be ample op-

portunity to file the record made up conformably to the views which we have just stated, the time for filing the record which was extended by this court on March 15 pending this application, will be now extended sixty days from that date.

And it is so ordered.

GREAT NORTHERN RAILWAY COMPANY *v.* WILES, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 196. Submitted January 26, 1916.—Decided March 20, 1916.

Where there is nothing to extenuate the negligence of the employé, or to confuse his judgment, and his duty is as clear as its performance is easy, and he knows not only the imminent danger of the situation, but also how it can be averted by complying with the rules of the employer, there is no justification for a comparison of negligences on the part of the employer and employé or the apportioning of their effect under the provision of the Employers' Liability Act. To excuse such neglect on the part of an employé of an interstate carrier would not only cast immeasurable liability on the carriers but remove security from those carried.

In such cases it is disputable whether the doctrine of *res ipsa loquitur* applies at all; and, in this case, *held* that the submission to the jury of whether negligence of the carriers existed as a deduction from the fact that a draw-bar pulled out from causes not shown by the testimony, and the proportion of the carrier's negligence in causing the death of an employé was, in view of the failure of the employé to perform his duty and comply with the rules of the employer under such circumstances, reversible error.

125 Minnesota, 348, reversed.

THE facts, which involve the construction and application of the Federal Employers' Liability Act and the valid-

ity of a judgment in an action thereunder, are stated in the opinion.

Mr. E. C. Lindley and *Mr. M. L. Countryman* for plaintiff in error.

Mr. W. R. Duxbury and *Mr. Lyle Pettijohn* for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

Action for damages for the killing of one Dennis E. Wiles, brought by the administrator of his estate, who is also his father and next of kin. It was brought under the Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149), as amended April 5, 1910 (36 Stat. 291, c. 143).

Wiles was a freight brakeman in the employ of the railway company in interstate commerce, the company being an interstate common carrier.

There was a verdict for plaintiff in the sum of $650. Upon motion of defendant the court, expressing the view that Wiles' negligence was the proximate cause of the accident which resulted in his death, rendered judgment that, notwithstanding the verdict, plaintiff take nothing by his action, that the same be dismissed, and that the railway company recover of plaintiff $36.52 costs.

The judgment was reversed by the Supreme Court of the State and judgment ordered to be entered on the verdict.

The only issue is as to the negligence of the railway company and the contributory negligence of the deceased and the causal relation, if either existed, to the death of the deceased.

The determining facts of the case are as follows:

Deceased was a rear brakeman on a freight train of the railway company proceeding easterly between Grotto and

Skykomish, Washington. After having passed a curve in the road the train broke in two by the drawbar pulling out of the sixth car from the engine, which caused the train to stop instantly. It was run into shortly after (from 3 to 5 minutes, it was testified) by a passenger train drawn by two engines. The night was pretty dark and the weather a little misty. At the place of collision the track was obstructed by a very sharp curve and a bluff on the right hand side for about five box car lengths, and the rear end of the freight train at that place could not be seen more than five box car lengths away. On the left hand side of the engine, which is the fireman's side, the track could not be seen more than a car length ahead because that would be on the outside of the curve. The engineer of the passenger train did not know of the existence of the freight train ahead and no negligence is attributed to him. The deceased and the conductor of the freight train were in the caboose and both were killed. What caused the pulling out of the drawbar was not shown, nor was there proof that it was defective or that the company was negligent in the care or use of it.

The head brakeman of the freight train testified that the train stopped immediately upon the pulling out of the drawbar, that he descended from the train and hastened back to the caboose for a chain and that he saw the headlight of the passenger train as it came around the curve. He further testified that it was Wiles' duty to have gone back to protect the rear end of his train at the time the passenger train was due out of the station in the rear, and that this applied whether the delayed inferior train which was ahead was running or standing still; that it was the duty of Wiles to have gone back a sufficient distance to guarantee full protection to the rear of his train, and that the engineer of the freight train, at the time the train broke in two, signaled the rear brakeman to go back and protect the rear end of his train. The same testimony as

to the duty of Wiles was given by another witness. It appeared also from the testimony that the freight train was losing time by slipping and that Wiles knew the time that the passenger train was due to leave Grotto station and he should have dropped off or dropped fusees on the track to notify the engineer of the passenger train that the freight was running slow. The fusees are of red and yellow lights; the red means to stop for ten minutes, the yellow means to bring the train under control and keep it under control until the next station is reached.

The rules of the railway company were put in evidence as follows:

"Rule 99. When a train stops or is delayed by any circumstance under which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail six rail lengths apart, or a lighted fusee in the center of the track when conditions require."

"Rule 100. If the train should part while in motion trainmen must, if possible, prevent damage to the detached portions. The signals prescribed by 13D and 15F must be given."

13D is the lantern signal or hand signal, either one; 15F is the whistle signal. Rule 100 applied to what should be done by the members of the train crew for the protection of the separated portions of the train itself. Rule 99 applied to what should be done for the protection of other trains approaching.

The Supreme Court applied the rule of *res ipsa loquitur* and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court entering judgment for the company notwithstanding the verdict.

The application of the doctrine to cases like that at bar is disputable. *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658; *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 486. We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* BOND, ADMINISTRATOR OF TURNER.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 486. Argued February 23, 1916.—Decided March 20, 1916.

One who is not an employé of an interstate carrier, but an independent contractor, cannot recover, nor can his representative, under the Employers' Liability Act, even if killed or injured while engaged in services in interstate commerce.

Although a certain direction or information may be given by the carrier to one contracting with it, if, as in this case, the contract is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action to be judged by its results, and the person so contracting controls the manner of the work done by himself and those employed by him, he is a contractor with, and not an employé of, the carrier within the meaning of the Employers' Liability Act.

A contract to shovel coal on a per ton basis, and with provisions assuming all risk and liability for injury to, or for death of, himself and persons employed by him, between an interstate carrier and an independent employer of labor who had other contracts for work with the same carrier and with other companies, *held*, not to be an evasion of the provision of § 5 of the Employers' Liability Act, that any contract or device for exemption of the carrier's liability under the act shall be void.

THE facts, which involve the application and construction of the Federal Employers' Liability Act and the validity of a judgment in an action thereunder, are stated in the opinion.

Mr. R. J. Roberts, with whom *Mr. J. G. Gamble*, *Mr. M. L. Bell*, *Mr. C. O. Blake* and *Mr. T. P. Littlepage* were on the brief, for plaintiff in error.

Mr. John C. Moore for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages caused by the railway company by the killing of the deceased, William L. Turner, through the negligence, it is alleged, of the company. It was brought in the district court of Garfield County, Oklahoma, and invoked the benefits of the Employers' Liability Act of Congress of April 22, 1908 (35 Stat. 65), c. 149, as amended April 5, 1910 (36 Stat. 291), c. 143. The case was removed on petition of the railway company to the United States District Court for the Western District of Oklahoma and remanded by that court to the state court. There an amended petition was filed by plaintiff in the action, to which an answer was filed.

After answer the case was tried to a jury, which returned a verdict for the sum of $7,583.00, distributed in certain proportions among those dependent upon the deceased. Judgment was entered upon the verdict and sustained by the Supreme Court of the State.

The case went to the jury upon the effect of certain contracts between deceased and the company, whether he was the company's servant or a contractor with it, and whether, if he was the servant of the company, it was guilty of negligence or whether he was guilty of contributory negligence.

The facts are not much in dispute. The company is an interstate common carrier and its line runs through the limits of the City of Enid, Garfield County, State of Oklahoma. Within the city there are six parallel tracks which run nearly from the north to the south, bearing as they proceed a little to the west. At the south end near their termination are located coal chutes, into the pockets or tipples of which coal is shoveled from cars set on the chutes for the use of all engines, local and interstate. The City of Enid has the power to establish and

did establish by ordinance a speed limit of ten miles an hour for all trains within its limits, beyond which it was unlawful to proceed.

The relation of Turner to the railroad company was under two contracts, one dated November 1, 1910, the other October 1, 1911. In the first contract the railroad company is party of the first part and Turner party of the second part and is called "Contractor." The covenants of one are made the consideration for the covenants of the other, and Turner, as contractor, agrees first "to furnish all the labor required and necessary to handle; and (a) to handle all the coal required by the company at Enid, from either open or closed cars, or both, and to place the same in coal chute pockets of the company; to gather up all coal that falls from the coal chute pockets to the ground and place the same on cars or engines as desired by the company. (b) To break all coal to the size of four inch cubes or less before delivery to chutes for engine use and to unload all coal for stationary boilers. (c) To unload wood from cars to storage piles located on company's right of way in Enid. (d) To load cinders from the right of way to cars at points designated by the company. (e) To unload sand from cars furnished by the company at points designated by it.

2nd. The company agrees to pay for the services enumerated in certain designated numbers of cents per ton, or cord or yard, as the case may be, to be paid upon estimates and records of the company.

3rd. Contractor agrees to maintain a sufficient supply of coal in the coal chutes and break or crack all coal to suitable sizes.

4th. Contractor expressly assumes all liability for injuries to or death of persons in his employ or loss or injury to his property, whether caused by the negligence of the company, its agents or employees, and he covenants to save the company harmless on account thereof, or for

or on account of any injury to or death of any person employed by him when and while such persons may be in or about the cars, engines and tracks of the company, "and any injury to said contractor while performing any services under this contract which might be or have been delegated to his agent or employees." And the contractor expressly assumes all liability for injury to or death of third persons, including the employés of the company, occasioned by any of his acts, and the company shall not be liable to him in case of his death or injury while employed in the work set forth.

5th. Punctuality of performance is stipulated for; (6th) the contract to continue until terminated, as it may be by either party upon fifteen days' notice; (7th) or upon failure of contractor to perform his duties, at the option of the company, without being liable in damages therefor, of which failure the company shall be the sole judge; (8th) the company to furnish the necessary tools for the performance of the stipulated services.

9th. It is "agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

10th. The company shall keep a record of all coal delivered and shall make settlements and pay the contractor for handling the coal upon the basis of such handling, and the contractor shall make daily reports of the cars unloaded by him and shall receive, collect and deliver to the duly authorized representative of the company a ticket from each engineman, hostler or other employee, showing the number of tons of coal delivered to any engine; (11th) payment of the work to be made monthly; and (12th) the contract and all the terms and conditions, rights and obligations thereof, to inure to the heirs, administrators, executors, legal representatives,

assigns and lessees of both parties, but assigning or subletting shall not be without the written consent of the company.

Under the other contract Turner was required to cooper all cars which the Round House foreman directed him to prepare to fit the cars to hold grain in transit, the foreman to be the sole judge whether the preparation was in accordance with the contract. The manner of preparation is detailed and the price to be paid therefor in cents, the company to furnish the materials.

There are provisions as in the other contract to save the company from liability to persons or property. The contract was to continue until terminated upon thirty days' notice.

This contract is pertinent only for illustration, and otherwise may be put out of view. The deceased was killed, it is the contention, while performing services under the first contract.

Turner had a contract with the Enid Mill & Elevator Company to unload coal, and, directly after 4 o'clock on the day he was killed, having finished a particular service at which he and one of his employés had been engaged, remarked that he would "go down and gather up the tickets and order a car of coal for the morning," and started down the tracks toward the chutes.

He next appeared about 5:25 o'clock at the cinder pile of the Enid Mill & Elevator Company at what is designated as the "White Mill," and there had a conversation with an employee of that company, and asked him, the employee, if he thought he would have enough coal for the boiler room to run until Monday night. While they were talking a passenger train signaled its approach to the station and Turner said, "That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes." He then started towards the freight house.

The trial court thought the testimony was indefinite of Turner's intention and hesitated to decide that he was engaged in services to the railway company rather than to the Enid Mill & Elevator Company, but finally left it to the jury to decide.

From the "White Mill" Turner passed along the tracks of the railroad and was seen by a witness walking between tracks 3 and 4 with his hands behind him, and while so walking and when he was at a point east of the north end of the freight house an engine and two box cars and a flat car, backing on the track to his left in the direction in which he was going, and running at about 25 miles an hour and in excess of the speed limit prescribed in the ordinance, ran over and killed him. It is a reasonable conjecture that the character of the day and the noise and confusion of the approaching passenger train so distracted his attention that he did not hear the approach of the backing cars and warning yells of the brakeman and apprehended no danger.

Besides excessive speed there were other elements of negligence by the company which the plaintiff relied upon.

We may pass by the assignments of error based on the rulings upon the evidence and in giving and refusing instructions. The determining consideration is the relation in which Turner stood to the company, whether he was an employee of it or an independent contractor.

The trial court submitted the question to the decision of the jury; the Supreme Court, considering the contract of November 1, 1910, hereinbefore set out, and certain testimony, decided that Turner was an employee of the company. The court said: "Not only did the contract reserve to the company the right to direct deceased in his work but it might be well to know, although we are only passing upon the face of the contract, that the company, pursuant to the power therein reserved, did that very thing, which confirms us in our opinion, gathered

from the face of the contract, that the same was not capable of execution without such direction and control. Such amounts to a practical construction of the contract by the company. Mr. Bowman, station agent and yardmaster of defendant, testified:

"'Q. From whom did Mr. Turner get instructions about handling work performed by him?

"'A. Under his contract, from me.

"'Q. You directed him what to do?

"'A. Yes, either me or my chief clerk.

"'Q. So that he was under your supervision and control all the time?

"'A. In so far as the contracts were concerned, yes, sir.

"'Q. He performed his duties in accordance with what you directed him to do?

"'A. Yes, sir.

"'Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island coal?

"'A. Yes, sir.'"

To which testimony this must be added:

"'Q. Did you have anything to do with directing him in detail as to how he performed the terms of his contract?

"'A. No, sir.'"

We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of

his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect.

The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision for payment, from the careful assignment of liabilities and the explicit provision that Turner "shall be deemed and held as the original contractor and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done. *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518; *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 227.

The case falls, therefore, under the ruling in *Casement* v. *Brown*, 148 U. S. 615, 622.

We do not think that the contract can be regarded as an evasion of § 5 of the Employers' Liability Act, which provides "that any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: . . ."

Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct

and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences.

Thus being of opinion that Turner was not an employee of the company but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

SOUTHERN WISCONSIN RAILWAY COMPANY *v.* CITY OF MADISON.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 260. Argued March 6, 7, 1916.—Decided March 20, 1916.

Although the charter of a railway company was held in this case to be a contract, a later ordinance requiring it to pave with asphalt the space between its tracks and one foot on each side was held not to be an impairment of its obligation or a violation of the due process or equal protection provisions of the Fourteenth Amendment.

The state court having found that the pavement between the tracks of a street railway needed repair, and that the pavement originally used was not suitable and was additionally unsuitable when the rest of the street was paved with asphalt, this court will not declare the State wrong in holding that a provision requiring the railway company to keep the space between the tracks and one foot on each side in proper repair so as not to interfere with travel over the same was broad enough to cover requiring it to be paved with asphalt when the rest of the street was so paved.

156 Wisconsin, 352, affirmed.

THE facts, which involve the constitutionality of a street paving ordinance of the City of Madison, Wisconsin, under the contract clause of, and the due process provisions of the Fourteenth Amendment to, the Federal Constitution, are stated in the opinion.

Mr. Burr Jones, with whom *Mr. E. J. B. Schubring* was on the brief, for plaintiff in error:

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 549, 555; *St. Paul Gas Co.* v. *St. Paul*, 181 U. S. 142, 148; *City Ry.* v. *Citizens Ry.*, 166 U. S. 557, 563; *New Orleans Water Works* v. *Louisiana*, 185 U. S. 336, 350; *Davis Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Hamilton Gas Co.* v. *City*, 146 U. S. 258, 266; *Ross* v. *Oregon*, 227 U. S. 150, 162; *Cleveland* v. *Cleveland City Ry.*, 194 U. S. 517, 536; *Nor. Pac. Ry.* v. *Duluth*, 208 U. S. 583, 590; *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311, 320; *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 65, 81; *Southwest Light Co.* v. *Joplin*, 101 Fed. Rep. 23.

The passage of the ordinance of June 11, 1910, was such state legislation as impaired the obligation of the contract and raised a Federal question when properly presented in the record. Cases *supra* and see also *Houston & Tex. R. R.* v. *Texas*, 177 U. S. 66, 74, 77; *McCullough* v. *Virginia*, 172 U. S. 104, 117; *University* v. *People*, 99 U. S. 309, 313; *Water Co.* v. *Walla Walla*, 172 U. S. 1; *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486, 495.

The state court by its decision gives effect to the ordinance. Cases *supra* and see *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116, 140; *Houston & Texas Central Ry. Co.* v. *Texas*, 177 U. S. 66, 74–77; *McCullough* v. *Virginia*, 172 U. S. 102, 116; *University* v. *People*, 99 U. S. 309, 320.

Mr. William Ryan for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the City of Madison to recover the cost of asphalt pavement between the rails of the defendant's track and one foot on the outside of them, for a certain distance along University Avenue in that City. The declaration, after stating the ordinances under which the defendant and its predecessors had built and operated the street railway concerned, sets out an ordinance of June 11, 1910, requiring the defendant, under a penalty, to do the work above described. The defendant answered that to make it pay the cost would deprive it of its property and contract rights under its franchise without due process of law and the equal protection of the laws, contrary to the Constitution of the United States. The judge before whom the case was tried found that the designated space had become so out of repair as to interfere with travel and that the crushed stone then used was not a proper pavement, and would interfere with the asphalt laid down by the City, and gave judgment for the plaintiff. The Supreme Court accepted the defendant's position, that its charter was a contract, but met the argument based upon it by a construction that warranted the later ordinance, and judgment for the plaintiff was affirmed. 156 Wisconsin, 352.

As our opinion is that the judgment should be affirmed, we shall not dwell upon a motion to dismiss made by the defendant in error. The court expressly upheld the later ordinance, and whether that ordinance can be upheld without impairing the obligation of the admitted contract of the charter is a Federal question none the less that the answer depends upon the construction of the instrument. Even if the opinion below be read as asserting that the duty existed by the charter alone irrespective of the later ordinance, still as the ordinance was set up and relied upon in the declaration and was present im-

pelling, so far as might be, the decision reached and was given effect by that decision, we should not dismiss the case. *Terre Haute &c. R. R.* v. *Indiana*, 194 U. S. 579. We lay on one side a suggestion that runs counter to the opinion below and to common sense, that the later ordinance, when it requires the defendant to do the work under a penalty of not exceeding fifty dollars a day, is not a legislative command but merely a notice to perform a duty already in force.

Up to 1892 the defendant's franchise was held under a charter that, after providing for the disposition to be made of snow on the track, continued: "And said company shall keep the space between the rails and for the distance of one foot on the outside side of the rails in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at its own cost and expense." The charter then went on to provide that whenever a street in which were tracks should be paved or macadamized, the railway company should pave or macadamize the above-mentioned space and keep it in equally good and corresponding condition. In 1892, a new ordinance was passed authorizing the company to build and operate a road in the City and to use electricity as a motive power upon its tracks then or thereafter authorized and constructed. It had the above-quoted provision as to keeping the space in repair, and the grant was made 'subject to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact,' but the ordinance did not repeat the provision as to paving. The Supreme Court held that the requirement to keep the space in repair was enough, and, by a diminished majority, that the ordinance of 1910 fell within the reasonable rules and regulations that the company was bound to obey.

If there had been no ordinance of 1910, but the suit

had been brought simply upon the alleged duty under the charter of 1892, and the City had recovered as it might have upon the present interpretation of that instrument, there would have been no question for this court. *Fisher* v. *New Orleans*, 218 U. S. 438, 440. While this consideration has not required us to dismiss the writ of error it suggests reasons of more than usual force for following that interpretation. Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point. *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 243, 244. We appreciate the argument to be drawn from the omission of the paving clause in the charter of 1892, and the possible reason for its omission in the fact that the experiment of substituting electricity for horse power then was relatively new. But it is also possible that the clause was deemed superfluous, if, indeed, the omission should be considered at all. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 543, 544. It is to be remembered that this requirement is a widespread one with regard to street railways. *Reading* v. *United Traction Co.*, 202 Pa. St. 571, 573; 215 Pa. St. 250, 255. There are persuasive decisions that the obligation to keep the space 'in proper repair so as not to interfere with travel over the same' extends to what was demanded of the defendant in this case. *Mayor of New York* v. *Harlem Bridge, Morrisania & Fordham Ry. Co.*, 186 N. Y. 304. *State ex rel. Milwaukee* v. *Milwaukee Electric Ry. & Light Co.*, 151 Wisconsin, 520. The reasons for construing such ordinances strictly in favor of the public are reiterated in the present case. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 33, 34. *Blair* v. *Chicago*, 201 U. S. 400, 472, 473. Both of the grounds taken by the court below get some support from

decisions of this court. *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379, 389. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 397. In view of the finding that the pavement needed repair and that crushed stone would not have been suitable for the purpose and would have been additionally unsuitable when the rest of the street was paved with asphalt we do not feel prepared to declare the judgment wrong.

Judgment affirmed.

CUYAHOGA RIVER POWER COMPANY *v.* CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 465. Argued October 20, 1915.—Decided March 20, 1916.

As the bill in this case states that a municipality does not intend to institute proceedings to condemn, but does intend to take plaintiff's property rights without compensation, and has taken steps that will destroy such rights, and that in so doing it purports to be acting under an ordinance which violates the contract clause of, and the Fourteenth Amendment to, the Federal Constitution, *held* that such municipal action is to be regarded as action of the State, and as the only way to determine whether plaintiff has rights that the municipality is bound to respect, is to take jurisdiction and determine the case on the merits, the District Court has jurisdiction.

THE facts, which involve the jurisdiction of the District Court, are stated in the opinion.

Mr. Carroll G. Walter and *Mr. John L. Wells*, with whom *Mr. Wade H. Ellis*, *Mr. R. Golden Donaldson* and *Mr. Charles A. Collin* were on the brief, for appellant.

Mr. Charles F. Choate, Jr., with whom *Mr. Jonathan Taylor* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by an Ohio corporation against a city of Ohio to prevent the latter from appropriating the waters of the Cuyahoga River and its tributaries above a certain point. It alleges that the plaintiff was incorporated under the laws of Ohio for the purpose of generating hydro-electric power by means of dams and canals upon the said River, and of disposing of the same; that it has adopted surveys, maps, plans and profiles to that end, has entered upon, located and defined the property rights required, has instituted condemnation proceedings to acquire a part at least of such property, has sold bonds and spent large sums and has gained a paramount right to the water and necessary land. The bill also alleges that the City has passed an ordinance appropriating the water and directing its solicitor to take proceedings in court for the assessment of the compensation to be paid. The District Court dismissed the bill for want of jurisdiction on the ground that it presented no Federal question, because if the plaintiff had any rights they could be appropriated only by paying for them in pursuance of the verdict of a jury and a judgment of a court. It made the statutory certificate and the case comes here by direct appeal. 210 Fed. Rep. 524.

It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and constitution of Ohio and concluding that the City has no constitutional power to take the property and franchises that the plaintiff is alleged to own or any property for a water supply, it alleges that the City does not intend to institute any proceedings against the plaintiff but intends to take its prop-

erty and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff's rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the State. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278. Whether the plaintiff has any rights that the City is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed.

Decree reversed.

GREAT NORTHERN RAILWAY COMPANY *v.* KNAPP.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 690. Argued February 24, 1916.—Decided March 20, 1916.

Where there is no question as to the interpretation of the Employers' Liability Act or as to the definition of legal principles in its application, but the question is simply whether there were matters for determination of the jury, this court, with due regard to the appropriate exercise of its jurisdiction, will not disturb the decision of the court below unless error is palpable.

In cases of this sort arising under the Employers' Liability Act, not be-

ing of exceptional character, this court confines itself to the mere announcement of its conclusion, as it does, in this case, of affirmance. 130 Minnesota, 405, affirmed.

THE facts, which involve the validity of a verdict and judgment in suit for personal injuries under the Federal Employers' Liability Act, are stated in the opinion.

Mr. A. L. Janes, with whom *Mr. E. C. Lindley* and *Mr. M. L. Countryman* were on the brief, for plaintiff in error.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* and *Mr. John I. Davis* were on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought under the Federal Employers' Liability Act. The plaintiff (defendant in error) was the station agent at Dassel, Minnesota. It was a part of his duty to attend the pump house some distance from the station, once or twice a day, and keep filled the water tank for locomotives. The water was pumped by means of a gasoline engine, and the pump and engine were in a small room. In proceeding to start the pump at the time in question, the plaintiff's arm was caught in the clutch of the engine and cut off. As the Supreme Court of the State put it, the plaintiff claimed that "he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially but inadequately guarded it." The state court deemed the evidence to be 'very clear' that it was practicable to interpose safeguards 'so as to fully protect from danger those who had to pass by.' The plaintiff alleged negligence in his employer, in failing to provide suitable

protection; the company denied negligence and insisted upon the defense of assumption of risk. The trial court held that upon the evidence these questions were for the jury, and there was a verdict for the plaintiff. On motion, a new trial was ordered unless the plaintiff should remit a portion of the damages, and, this being done, judgment was entered which was affirmed by the Supreme Court of the State. 130 Minnesota, 405.

It was conceded that when the injury was received, plaintiff was engaged in work pertaining to the defendant's business as a common carrier in interstate commerce, and that the Federal Act applied. The court recognized that, if assumption of risk by the plaintiff was made out, it would bar recovery under the Act. *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492. The court charged the jury accordingly, and there was no exception by the defendant to the charge, or request on its part for any additional instructions,—the defendant contenting itself with its motion for dismissal or for a direction of a verdict in its favor. The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668, 673; *Seaboard Air Line Railway* v. *Koennecke*, 239 U. S. 352, 355.

Judgment affirmed.

JOHNSON *v.* RIDDLE.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 161. Argued January 12, 1916.—Decided March 20, 1916.

Under the provisions relating to town sites in the Atoka Agreement between the United States and the Choctaw and Chickasaw tribes (found in Act of June 28, 1898, c. 517; 30 Stat. 495, 505, 508), the preferential right to purchase improved town lots was conferred upon the owner of "permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses," without regard to the lawfulness or unlawfulness of the previous possession of the land by the owner of the improvements.

Under the provisions of the Atoka Agreement relating to purchase of town lots (30 Stat. 508), and regulations contained in subsequent legislation, authority to appraise lots, improved or unimproved, to ascertain the ownership and value of the improvements, and to dispose of the lots in conformity to the provisions of the Agreement, was conferred upon the town site commission, and afterwards upon the United States Indian Inspector, subject to the supervision of the Secretary of the Interior.

In case of contest, the findings of fact by the Commission or the Inspector, affirmed on final appeal by the Secretary of the Interior, are binding upon the courts, in the absence of gross mistake or fraud, and the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the right of purchase, and ultimately issuing the patent, to the wrong party.

The Atoka Agreement (Act of June 28, 1898, c. 517, 30 Stat. 505, 508), when ratified by Congress and by the Choctaw and Chickasaw tribes, superseded all customs, if such there were, that had sanctioned the leasing of town lots to non-citizens of the tribes; and its provisions could not be carried into effect without terminating existing rights of occupancy, if any, saving as these coincided with the ownership of permanent improvements.

A tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law.

That a tenant holding a town lot in the Chickasaw district of the Choctaw Nation, under lease from a non-citizen having no rights

in the land, had retained possession after refusal to pay rent, thereby preventing the landlord from erecting improvements such as described in the Atoka Agreement, did not estop the tenant who had erected substantial and permanent improvements thereon from acquiring the lot in his own right under the provisions of the Agreement.

41 Oklahoma, 759, affirmed.

THE facts, which involve the title to a town lot in the town of Chickasha in the Chickasaw District of the Choctaw Nation, and the construction and application of the townsite provisions of the Atoka Agreement, the Curtis Act and other statutes affecting the property of the Chickasaw and Choctaw tribes, are stated in the opinion.

Mr. C. B. Ames, with whom *Mr. Alger Melton* was on the brief, for plaintiffs in error:

The decision of the townsite board as approved by the Secretary of the Interior was based on an erroneous proposition, to-wit, that the effect of the Atoka Agreement was to terminate the relation of landlord and tenant. *Ellis* v. *Fitzpatrick*, 64 S. W. Rep. 567; *Ellis* v. *Fitzpatrick*, 118 Fed. Rep. 430; *Fraer* v. *Washington*, 125 Fed. Rep. 280; *Shy* v. *Brockhouse*, 7 Oklahoma, 35; *Walker Trading Co.* v. *Grady Trading Co.*, 39 S. W. Rep. 354; *Kelly* v. *Johnson*, 39 S. W. Rep. 352; *Williams* v. *Works*, 76 S. W. Rep. 246.

Under the Atoka Agreement as embodied in the Curtis Act which provides that the owner of the improvements shall have the right to buy one residence and one business lot at fifty per cent of the appraised value, a tenant who has wrongfully withheld possession of such a lot from his landlord, thereby preventing his landlord from erecting improvements thereon, cannot acquire title to the lot as against the landlord. *Rector* v. *Gibbon*, 111 U. S. 276; *Lamb* v. *Davenport*, 18 Wall. 307; *Atherton* v. *Fowler*, 96 U. S. 513; *Ricks* v. *Reed*, 19 California, 551; *Goode* v. *Gains*, 145 U. S. 141; *Trenouth* v. *San Francisco*, 100 U. S.

251; *Hagar* v. *Wikoff*, 2 Oklahoma, 580; *Downman* v. *Saunders*, 3 Oklahoma, 227.

The tenant having acquired a deed in violation of the rights of his landlord holds the title as trustee for his landlord. *Rector* v. *Gibbon*, 111 U. S. 276; *Baldwin* v. *Clark*, 107 U. S. 463; *Wallace* v. *Adams*, 143 Fed. Rep. 716; *James* v. *Germania Iron Co.*, 107 Fed. Rep. 597; *Trice* v. *Comstock*, 121 Fed. Rep. 620; *Bertran* v. *Cook*, 32 Michigan, 518.

Mr. Joseph W. Bailey, with whom *Mr. C. B. Stuart*, *Mr. W. A. Ledbetter* and *Mr. A. C. Cruce*, were on the brief, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court.

This was an action of ejectment, commenced before the admission of Oklahoma as a State in the United States Court for the Southern District of the Indian Territory, and brought to a conclusion in the state courts. There have been many changes of interest *pendente lite*, and corresponding changes of parties. The original plaintiffs were Riddle, now defendant in error, and one Cook, whose interest Riddle has since acquired. The interests of the original defendants have been acquired by plaintiffs in error through mesne conveyances that will be stated below. The subject of the action is a town lot in the town of Chickasha, in the Chickasaw district of the Choctaw Nation, to which plaintiff claimed title by purchase under the townsite provisions of the Atoka Agreement with the Choctaw and Chickasaw tribes, found in the act of Congress known as the Curtis Act (June 28, 1898, ch. 517; 30 Stat. 495, 505, 508), followed by a patent executed, after the commencement of the action, in accordance with the supplemental agreement with the same tribes (Act of July 1, 1902, ch. 1362, § 51; 32 Stat. 641, 653), and

set up in a supplemental complaint. The defendants admitted the legal title to be in Riddle, but by cross-complaint sought to have him declared a trustee for their benefit and decreed to convey the title to them. A judgment refusing to declare such a trust, and awarding the lot to Riddle, was affirmed by the Supreme Court of Oklahoma (41 Oklahoma, 759), and the case is brought here, under § 237, Jud. Code, upon the ground that the decision was against rights set up by plaintiffs in error under the provisions of the Agreement.

The facts are as follows: Some years prior to the making of the Agreement, one Fitzpatrick, a white man not entitled to citizenship in any Indian tribe, made a lease of the lot in controversy, then vacant and unimproved, to one Barnhart, who went into possession and erected a substantial house and other improvements, which were to belong to him, subject to the payment of a ground rent to Fitzpatrick. There is nothing to show what right Fitzpatrick claimed or that in fact he had any right to seize upon vacant tribal lands and contract concerning them as he did. In the year 1897, Barnhart sold the improvements and transferred the possession of the lot to one Ellis, who entered into possession and made further improvements. About April 1, 1898, Ellis refused to pay rent, and on July 7, in the same year, Fitzpatrick brought a suit for unlawful detainer against him in the United States Court, alleging, in an amended complaint filed in February, 1899, that he desired possession for the purpose of being able to place upon the lot such improvements as would protect his right to the land under the provisions of the Agreement. Fitzpatrick prevailed in the United States Court, and, on appeal, in the Court of Appeals for the Indian Territory (*Ellis* v. *Fitzpatrick*, 3 Ind. Ter. 656; 64 S. W. Rep. 567), and also in the Circuit Court of Appeals for the Eighth Circuit, whose decision was rendered October 27, 1902 (118 Fed. Rep. 430; 55 C. C. A. 260).

Meanwhile Ellis retained possession by means of a supersedeas bond.

In February, 1902, the Townsite Commission for the Chickasaw Nation, organized pursuant to the provisions of the Atoka Agreement, visited Chickasha for the purpose of appraising town lots and awarding them to persons having the preferential right to purchase under the terms of the Agreement. Ellis having conveyed his rights to Riddle and Cook, the lot was scheduled to them, and on June 12, 1902, they were notified that they had the right to purchase it. A week later they availed themselves of this right by paying to the United States Indian Agent the proper percentage of the appraised value to make up the full purchase price of the lot, and took from him a proper receipt.

Pending the unlawful detainer suit, Fitzpatrick conveyed whatever interest he had in the lot to a Mrs. Cross, and she conveyed an undivided half interest to one Bourland. In January, 1903, after the decision of the Circuit Court of Appeals, Bourland and Cross obtained possession of the lot with the improvements, and in the following month the present action of ejectment was commenced by Riddle and Cook against Fitzpatrick and the persons in possession. Thereafter Bourland and Cross conveyed their interest to E. B. and H. B. Johnson, the present plaintiffs in error, and they were substituted as defendants. Riddle bought the interest of Cook, and thus became the sole plaintiff. Pending the action, a contest was instituted, either by Bourland and Cross or by the Johnsons, against Riddle and Cook, concerning the award and scheduling of the lot to the latter. The townsite commission having been abolished by the Secretary of the Interior pursuant to Act of March 3, 1905, ch. 1479; 33 Stat. 1048, 1059; the contest was heard before the United States Indian Inspector assigned to the Indian Territory, upon whom this duty was imposed by regulations ap-

proved by the Secretary. Rep. Ind. Inspec., 1905, pp. 5, 22, 23; House Doc. No. 5, 59th Cong., 1st Sess., vol. 19, pp. 705, 722, 723. The Inspector made full findings of fact, and in an elaborate opinion decided in favor of contestees. Upon appeal this decision was affirmed by the Commissioner of Indian Affairs, and upon appeal to the Secretary of the Interior it was again affirmed. These decisions proceeded upon findings to the effect that at the time of the ratification of the Atoka Agreement and at the time the townsite of Chickasha was laid out by the Townsite Commission, and when the plats prepared by the Commission were finally approved by the Secretary of the Interior, Ellis was the owner of permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, on said lot; that none of these improvements was in any way in issue in the unlawful detainer suit, and Ellis' ownership of them was not denied or disputed, but on the contrary was admitted by Fitzpatrick in his pleadings, and they were in no way adjudicated upon in that suit; that Riddle and Cook afterwards purchased the improvements from Ellis, and having received notice from the Townsite Commission, as already mentioned, of their right to purchase the lot under the provisions of the Atoka Agreement, they forwarded to the United States Indian Agent the proper percentage of the appraisement to make up the full purchase price of the lot, and received his receipt for the same. After the final determination of the contest before the Department of the Interior, a patent was issued to Riddle and his associate, dated in May, 1907.

The Atoka Agreement between the United States and the Choctaw and Chickasaw tribes, negotiated April 23, 1897, amended by § 29 of the Curtis Act (June 28, 1898, ch. 517, 30 Stat. 495, 505), and thereby submitted for ratification by the members of the tribes, was ratified by a majority of votes at a special election held on August 24,

1898, the result of which was ascertained and proclaimed on August 30th by a board of commissioners for that purpose designated by the Act, and the Agreement thus became effective. (See 6th Ann. Rep. Dawes Comm., September 1, 1899, House Doc. No. 5, 56th Cong., 1st Sess., Vol. 19, p. 9; Homer's Const. and Laws of Chickasaw Nation, 1899, p. 420.) It contains provisions respecting townsites (30 Stat. 508), of which the pertinent portions are set forth in the margin.[1]

Regulatory provisions, embodied in an Act of May 31,

[1] "TOWN SITES. It is further agreed that there shall be appointed a commission for each of the two nations. . . . Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. . . . When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. . . . If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent. of said appraised value of the lot, and shall pay the sixty-two and one-half per cent. of said appraised value into the United States Treasury. . . . All lots not so appraised shall be sold from time to time at public auction. . . ."

1900 (ch. 598; 31 Stat. 221, 237, 238), were assented to by the Choctaws and Chickasaws in the supplemental agreement (Act of July 1, 1902, ch. 1362; 32 Stat. 641, 652), and other regulations were thereby added. Authority to appraise town lots, improved or unimproved, to ascertain the ownership and value of the improvements, and to dispose of the lots in conformity to the provisions of the Agreement, was thereby conferred upon the townsite commission, subject to the supervision of the Secretary of the Interior. (See *Ross* v. *Stewart*, 227 U. S. 530, 534.) Their unfinished duties were devolved upon the Secretary by the Act of 1905, under whose authority the Indian Inspector acted as already shown. The Supreme Court of Oklahoma therefore was correct in holding that the findings of the Inspector respecting matters of fact, affirmed on final appeal by the Secretary, were binding upon the courts, in the absence of gross mistake or fraud (neither of which is here present), and that the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the preferential right of purchase, and ultimately issuing the patent, to the wrong party. *Johnson* v. *Towsley*, 13 Wall. 72, 85; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Marquez* v. *Frisbie*, 101 U. S. 473, 476; *Gonzales* v. *French*, 164 U. S. 338, 342; *Ross* v. *Day*, 232 U. S. 110, 116.

Since the findings are to the effect that the improvements upon the lot were owned by Ellis, and by defendant in error through a purchase from him, the contentions of plaintiffs in error are reduced to these: that the decision of the Indian Inspector, approved by the Secretary of the Interior, to the effect that the Atoka Agreement terminated the relation of landlord and tenant, was based upon an erroneous construction of the Agreement, and ignored the equities of the landlord as against the tenant; that under a correct construction of the provision permitting the owner of the improvements to buy a town lot

at a fraction of the appraised value, a tenant who wrongfully withheld possession of such a lot from his landlord, thereby preventing him from erecting improvements thereon, could not acquire title to the lot as against the landlord; and that a tenant who, under the provisions of the Agreement, but in violation of the rights of his landlord, has acquired a deed for such a lot, holds the title as trustee for the landlord.

The Atoka Agreement of course is to be read in the light of the conditions out of which it arose. The Choctaw Indians acquired the territory in question under a treaty with the United States made at Dancing Rabbit Creek in the year 1830, Sept. 27 (7 Stat. 333). In accordance with the provisions of the treaty, and pursuant to authority conferred by Act of May 28, 1830 (ch. 148, § 3, 4 Stat. 411, 412), a patent was issued by the President of the United States, March 23, 1842, granting the land to the Choctaw Nation, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it, liable to no transfer or alienation, except to the United States, or with their consent." (Durant's Const. & Laws of Choctaw Nation, 1894, p. 31.) In 1837 the Choctaws entered into a treaty with the Chickasaws, by which the latter were privileged to form a district within the limits of the Choctaw country, "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws." This received the approval of the President and Senate of the United States. January 17, 1837, 11 Stat. 573, 575. In the year 1855 a new treaty was made between the United States and these tribes (June 22, 1855, 11 Stat. 611), by which the boundaries of their country were defined and the United States guaranteed the lands embraced within the specified limits "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that

each and every member of either tribe shall have an equal, undivided interest in the whole; *Provided, however,* no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." The westerly part of the country was established as a district for the Chickasaws, the easterly part for the Choctaws. After the Civil War, and in the year 1866, a new treaty was made, by the eleventh article of which it was recited that the land described in the treaty of 1855 "is now held by the members of said nations in common, under the provisions of the said treaty." April 28, 1866, 14 Stat. 769, 774. A plan for a survey, division, and allotment of the land was proposed by the same article, but this came to naught because of the non-assent of the Choctaw people. *Woodward* v. *deGraffenried,* 238 U. S. 284, 294. Thus matters remained until, in the course of time, the influx of white people into this and other parts of the Indian Territory created a new situation of great complexity, calling for a readjustment of the affairs of the Five Civilized Tribes. In 1893 the Dawes Commission was appointed, under authority of an act of Congress (March 3, 1893, ch. 209, § 16, 27 Stat. 612, 645), to enter into negotiations with those tribes for the purpose of extinguishing the tribal titles to lands. The annual reports of the Commission, a reference list of which is printed in 238 U. S. 296, give a complete and instructive account of its labors. The first of these reports, dated November 20, 1894, shows that among the original propositions submitted to the several tribes as a basis of negotiations it was suggested that townsites should be the subject of special agreements, such as would secure to the Indians and to investors "a just protection and adjustment of their respective rights." In explanation it was stated: "There are towns in the Territory ranging in population from a few people to 5,000 inhabitants. Nearly all of

them are noncitizens. . . . Many large and valuable stone, brick, and wooden buildings have been erected by noncitizens of these towns, and the lots on which they stand are worth many thousands of dollars. These town sites are not susceptible of division among the Indians, and the only practicable method of adjusting the equities between the tribes who own the sites and those who constructed the buildings is to appraise the lots without the improvements and the improvements without the lots, and allow the owners of the improvements to purchase the lots at the appraised value, or to sell lot and improvements and divide the money according to the appraisement." House Ex. Doc., Part 5, 53d Cong., 3d Sess., Vol. 14, pp. lxii, lxv.

The first agreement to be negotiated by the Commission was with the Choctaws under date December 18, 1896, but the Chickasaws refused to concur in this, and another was negotiated at Atoka, April 23, 1897, with both tribes. In its original form it is appended to the Fourth Report of the Commission, dated October 11, 1897 (House Doc. No. 5, 55th Cong., 2d Sess., Vol. 12, pp. cxvii, cxxii). It provided that a townsite commission should be appointed for each of the two nations; that each existing town site should be laid out and platted, and that "each lot, on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission . . . at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy the same at sixty-two and one-half per cent. of the said market value, within sixty days from date of notice served on him that such lot is for sale." It further provided that if the owner of the improvements should fail to purchase, the lot with improvements should be sold at auction, the

purchaser to pay the price to the owner of the improvements, less sixty-two and one-half per cent. of the appraised value of the lot, which was to be paid into the United States Treasury for the benefit of the Indians. This agreement, with some amendments, was ratified by Congress in § 29 of the Curtis Act and afterwards ratified by the voters of the two tribes, as already mentioned. The provision as to purchase of town lots was amended only by giving to the owner of the improvements the right to buy one residence and one business lot at fifty per centum, and the remainder of such improved property at sixty-two and one-half per centum, of the appraised market value.

The same Act contained, in its fifteenth section (June 28, 1898, c. 517, 30 Stat. 495, 500) a provision for the appointment of a townsite commission for each of the Chickasaw, Choctaw, Creek, and Cherokee tribes; allowing "the owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings," to deposit in the United States Treasury one-half of the appraised value of the lot excluding improvements, as a tender to the tribe of the purchase money for the lot; and permitting improved lots to be sold at auction if the owner of the improvements thereon failed to deposit the purchase-money within a limited time, in which case the purchaser at auction might by appropriate proceedings in the United States Court require the owner of the improvements to either accept their appraised value or remove the improvements from the lot. The same section provided for the sale of unimproved lots, the purchase-money to be deposited with like effect as in the case of improved lots; and authorized the tribes to make deeds to the purchasers conveying the title to such town lots, whereupon the purchase-money was to become the property of the tribe. These provisions would appear to have been superseded, as to the Choctaw and Chickasaw tribes, by their accept-

ance of the Atoka Agreement, and are mentioned only to show that in § 15, as in the Agreement, it was the owner of the improvements, and he alone, who was recognized as entitled to be considered in the sale of the town lots.

It is not necessary to say that the Agreement, when thus ratified by Congress and by the tribes, became the law of the land, and superseded all customs, if such there were, that had sanctioned the making of leases to non-citizens. By its terms towns, so far as they had been established within the domain of the tribes, were recognized, and provision was made for platting them, and for selling the lots, both improved and unimproved, the proceeds to become the property of the tribes. It was recognized that the money expended by white men in constructing the buildings and other permanent improvements had increased the value not only of the improved lots but of all lands within the town; and hence a preferential right of purchase was conferred upon "the owner of the improvements on each lot." But there is nothing in the history of the matter, any more than in the language employed, to give the least countenance to the suggestion that prior rights of occupancy were intended to be recognized in this Agreement. Ownership of improvements actually upon the soil was adopted as the sole foundation of the newly conferred right to acquire title to the soil itself. And these improvements must be "permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses." The exclusion of these latter, indicative merely of occupancy, is highly significant.

The provisions of the Agreement respecting the sale of town lots could not be carried into effect without terminating existing rights of occupancy, if such there were, saving as these coincided with the ownership of permanent improvements. Hence, if Fitzpatrick had any right to the soil, it came to an end either when the Agreement took effect in August, 1898, or, at latest, when its townsite pro-

visions were put in operation at Chickasha. It is insisted that Ellis, as tenant, was estopped to deny his landlord's title, and that Riddle is in no better case. *Elight's Lessee* v. *Rochester*, 7 Wheat. 535, 547. But a tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law. *England* v. *Slade*, 4 T. R. 682; *Blake* v. *Foster*, 8 T. R. 487; *Neave* v. *Moss*, 1 Bing. 360; *Hopcraft* v. *Keys*, 9 Bing. 613; *Doe d. Higginbotham* v. *Barton*, 11 Ad. & El. 307; *Den ex dem. Howell* v. *Ashmore*, 22 N. J. L. 261, 265; *Shields* v. *Lozear*, 34 N. J. L. 496, 500; *Hilbourn* v. *Fogg*, 99 Massachusetts, 11; *Lamson* v. *Clarkson*, 113 Massachusetts, 348.

The argument that Ellis, by withholding possession of the lot from Fitzpatrick, prevented him from erecting improvements such as would have satisfied the requirements of the Atoka Agreement so as to confer upon Fitzpatrick the preferential right to purchase the lot, and hence that Ellis and those claiming under him are estopped to purchase the land for themselves and must be held to have acquired it in trust for Fitzpatrick and those claiming under him, cannot prevail. The facts do not show that Ellis' refusal to pay rent, and his resistance to the forcible entry and detainer suit, were other than *bona fide*. Nor does it appear that Fitzpatrick, even before the Atoka Agreement, had any right of possession of the land as against the Indians. So far as the facts appear, he had no rights at all, except as against the tenant, and against him only because of the estoppel. In order to show that the tenant, by withholding possession, deprived the landlord of the opportunity of exercising a valuable right, it must be made to appear that, with the tenant out of the way, the right would have existed. But, if Ellis had given up possession, Fitzpatrick would have had no more right than any other white man to enter and erect improvements—that is to say, none at all. At most, he would have had a mere opportunity, without right,

and the deprivation of this cannot furnish a foundation for impressing a trust upon the title afterwards acquired by Ellis' grantee by direct purchase from the owners of the paramount title. Even were it made to appear that there was error in adjudging the title to the patentee, this would not raise a trust in favor of the contestant unless he could show that by the law, properly administered, the title ought to have been awarded to him. *Bohall* v. *Dilla*, 114 U. S. 47, 51; *Sparks* v. *Pierce*, 115 U. S. 408, 413.

What, then, was the nature of Fitzpatrick's equity? Under the facts found, both he and Ellis were trespassers upon the lands of the Indians, in disregard of rights secured to the latter by treaty with the United States, and in violation of § 2118, Rev. Stat. The lease created a mere estoppel between trespassers. The rights, if they may be called rights, of lessor and lessee alike were terminated by the force of the Agreement. Individual ownership of the land originated with that instrument, and can be only such as by its terms were created. It was competent for Congress, or for the Indian tribes, with the concurrence of Congress, to deal as they deemed proper with the practical situation resulting from the building of towns by white men within their borders. They chose to confer a preferential right of purchase, at a discount from the appraised value, not upon the "occupant," or "possessor," or "landlord," or "tenant," but upon "the owner of the improvements" other than those of a temporary nature. This did not cut off any pertinent equity, but it rendered all equities impertinent except such as related to the ownership of the improvements.

The Atoka Agreement, while accepting existing improvements of a substantial nature as part consideration for the purchase of town lots, contained no recognition of legitimacy in the previous occupation of the soil by white men, nor any official ratification of their intrusion upon the Indian lands. It laid aside, as immaterial, the question

whether improvements had been constructed with or without rightful possession of the land. In this respect it differed from the Original Creek Agreement of March 8, 1900 (Act of March 1, 1901, ch. 676; 31 Stat. 861, 866), the proposed Cherokee agreement of April 9, 1900 (Act of March 1, 1901, ch. 675; 31 Stat. 848, 853), which failed of ratification by the tribe (8th Ann. Rep. Dawes Comm., Oct. 1, 1901; House Doc. No. 5, 57th Cong., 1st Sess., Vol. 24, p. 11), and the Cherokee agreement of July 1, 1902 (ch. 1375; 32 Stat. 716, 723), which was ratified by the tribe (10th Ann. Rep. Dawes Comm., Sept. 30, 1903; House Doc. No. 5, 58th Cong., 2d Sess., Vol. 20, p. 115).

If Fitzpatrick had had any equitable right or interest in the improvements upon the lot in controversy, a very different question would be presented. But he had none.

We are referred to two decisions of the United States Court of Appeals for the Indian Territory that are said to uphold the legal validity of grants of leasehold interests in lands in the Choctaw and Chickasaw country prior to the Atoka Agreement. *Kelly* v. *Johnson* (1897), 1 Ind. Ter. 184, 189; 39 S. W. Rep. 352, 354; *G. W. Walker Trading Co.* v. *Grady Trading Co.* (1897), 1 Ind. Ter. 191, 196–198; 39 S. W. Rep. 354, 356. These cases, however, go no further than to hold that a possessory right might pass by transfer from a citizen of one of the Indian tribes to a non-citizen, and would protect the latter against forcible entry by others not showing a better right to the possession, nor acting under authority of the tribe, and that a lease of such lands with improvements estopped the lessee to question the lessor's title. See, also, *Wilson* v. *Owens* (1897), 1 Ind. Ter. 163; 38 S. W. Rep. 976; affirmed, 86 Fed. Rep. 571; *Hockett* v. *Alston*, 110 Fed. Rep. 910, reversing *S. C.*, 3 Ind. Ter. 432; 58 S. W. Rep. 675; *Williams* v. *Works*, 4 Ind. Ter. 587; 76 S. W. Rep. 246; *Fraer* v. *Washington*, 125 Fed. Rep. 280. These decisions leave untouched the authority of Congress, with

or without the consent of the tribe, to terminate all possessory interests and dispose of the fee in any manner deemed proper.

Much reliance is placed upon the decision of this court in *Rector* v. *Gibbon*, 111 U. S. 276, which turned upon the effect of an act of Congress in relation to the Hot Springs Reservation in the State of Arkansas (Act of March 3, 1877, ch. 108; 19 Stat. 377). The statute was passed to relieve the peculiar hardship resulting from a decision of the Court of Claims, affirmed by this court (*Hot Springs Cases*, 92 U. S. 698, 713, 715, 716), holding invalid, for reasons more or less technical, certain land titles set up against the United States, some of them under claims of preëmption and one under a New Madrid location, followed in each case by long years of possession. *Rector* v. *Gibbon* construed the legislation in the light of the circumstances out of which it arose, and so as to relieve those who had made improvements or claimed possession under the titles that had been found defective. It has no proper bearing upon the questions presented in the case at bar. *Lamb* v. *Davenport*, 18 Wall. 307; *Atherton* v. *Fowler*, 96 U. S. 513; and *Trenouth* v. *San Francisco*, 100 U. S. 251; cited by plaintiffs in error, are likewise aside from the point.

It is, perhaps, unnecessary to mention that the matter at issue here is not concluded by the decision in *Ellis* v. *Fitzpatrick*, 3 Ind. Ter. 656; 64 S. W. Rep. 567; *S. C.*, affirmed 118 Fed. Rep. 430; 55 C. C. A. 260; for that case concerned only the right of possession as between landlord and tenant, and Ellis' ownership of the improvements was admitted in the pleadings. The legal or equitable title to the soil was not involved.

From the views above expressed, it results that the judgment of the Supreme Court of Oklahoma must be

Affirmed.

BARLOW *v.* NORTHERN PACIFIC RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 257. Argued March 3, 1916.—Decided April 3, 1916.

Under the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, the rights of a railroad company entitled to the benefit of the act are paramount over those of a homestead entryman holding a patent of the United States in consequence of rights initiated after the line was in course of construction, but before the map of the right of way had been filed in local land office. *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, followed and *Minn., St. Paul &c. Ry.* v. *Doughty*, 208 U. S. 251, distinguished.

26 N. Dak. 159, affirmed.

THE facts, which involve the rights of a railroad company under the Right of Way Act of 1875 and of an entryman under the Homestead Act, are stated in the opinion.

Mr. S. E. Ellsworth, with whom *Mr. John Knauf* was on the brief, for plaintiff in error.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* and *Mr. Emerson Hadley* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, there came under consideration the construction of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands

of the United States," c. 152, 18 Stat. 482. The case involved a controversy between the railroad which was entitled to the benefit of the act and Jones, a homestead entryman holding a patent of the United States in consequence of rights initiated after the railroad had constructed its line but before it had filed a map of its right of way in the appropriate local land office. The railroad claimed that its right of way across the land covered by Jones' patent was paramount and Jones asserted that his right under the patent was dominant. Giving sanction to a previous course of administrative construction dealing with unsurveyed public land, it was held that an appropriation of the right of way by a construction of the road under the statute gave the railroad the paramount right and that the provision of the statute concerning the filing of a map and profile in the local land office was intended not to deprive of the power to fix and secure the right of way by construction in advance of filing such map and profile, but simply to afford the means of securing the right of way in advance of construction. The two methods of securing the right, the one by construction of the road, and the other in anticipation of construction by filing a map, were decided to in no wise conflict the one with the other as both afforded a means of securing the right which the statute gave. The opinion pointed out that although the previous administrative rulings were concerned only with unsurveyed lands, they were equally applicable under the statute to surveyed lands, and it was thus concluded, p. 132: "It follows from these views that the grant to plaintiff in error (the railroad company) by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error (Jones) was subject thereto."

In *Minneapolis, St. Paul, &c. Ry.* v. *Doughty*, 208 U. S. 251, the controversy was between the Railway Company and a settler holding a patent of the United

States whose right had been initiated before the construction of the railroad but after a preliminary survey which had been made by the railroad as a means of ultimately determining upon what line it would build its road, the stakes of such survey being, at the time the settler initiated his right, across the land in question. The claim of the settler was that a mere entry of the railroad for the purpose stated was not a construction within the meaning of the *Jones Case*, while that of the railroad was "that an entry upon the land to locate the road is as necessary as an entry on the land to build the road, and, being there, the railroad could not become a trespasser, either as to the government or as to the plaintiff." It was decided that as a mere preliminary step for the purpose of determining where the road should be located was not in and of itself the equivalent of a definite location of the line and a permanent appropriation of the right of way, the case was not covered by the rule of the *Jones Case* and the right of the settler was paramount.

Which of these rulings is here controlling is the single question arising for decision on this record, as will be at once seen by the following statement of the case:

The suit was commenced by the railroad to quiet its title to its right of way across a quarter-section of land which had been patented by the United States to the defendant. The latter not only by answer, but by counterclaim asserted the paramount nature of his right. The court below, affirming the action of the trial court, held that the rights of the railroad were paramount upon the conclusion that the facts found clearly brought the case within the rule established in the *Jones Case*. (26 N. Dak. 159.) The facts as thus established were these, p. 161:

"On the said 22d day of July A. D. 1883, intending to make entry of the said land therein described when the same was surveyed, and to acquire title to the same by

virtue of the compliance with the preëmption laws of the United States, said Frederick G. Barlow [the predecessor in title of the plaintiff in error] settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of railroad in operation across said land at any place, nor had plat or profile of the section of railroad extending across such land hereinbefore referred to been filed in the United States District Land Office at Fargo. We find from the evidence that, although Barlow entered upon the land upon the 22d day of July, A. D. 1883, the grading of the road across said land was completed prior to May 31st, 1883; that is to say, nearly two months before his settlement. We also find the rails were laid upon the grade between August 10th and 15th, 1883, and that trains were operated on said road and across said land soon after."

That under these facts the court below was right in holding that the controversy was foreclosed by the ruling in the *Jones Case* we think is too clear for anything but statement. The contention that the case is controlled by the *Doughty* and not the *Jones Case* because the road was not complete and operating when the entryman initiated his rights although it was then graded and was virtually ready for the ties and rails, if acceded to, would render the statute inefficacious and dominate the substance of things by the mere shadow. The first, because as it is impossible to conceive of the completion of the road by the placing of ties and the laying of rails without presupposing the prior doing of the work of grading, it would follow that the recognition of the right of an entryman to appropriate adversely to the railroad after the grading had been done and before the laying of the ties and rails would render the performance of the latter useless and would deprive the railroad therefore of all practical power to appropriate. The second, because as pointed out in *Stalker* v. *Oregon*

Short Line, 225 U. S. 142, the decision in the *Jones Case* rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to manifest that the railroad company had exercised its judgment as to where its line was to be established and had done such work of construction as "necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given" (p. 150). And it is obvious that this standard when complied with would serve not only to demonstrate the fixed intention of the railroad to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior appropriation. The distinction between the doctrine of the *Jones Case* and that of the *Doughty Case* is therefore that which necessarily must obtain between permanent work of construction of a railroad on a line definitely selected and fixed by it, and mere tentative work of surveying done by a railroad for the purpose of enabling the line which it was proposed to construct to be ultimately selected. The broad distinction between this case and the *Doughty Case* both as to the fundamental rights given by the statute and the protection to innocent parties was thus lucidly pointed out by the court below in its opinion:

"There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, ... The entryman in this case can have no more ground for complaint than could the entryman in the case of *Stalker* v. *Oregon Short Line*, *supra*. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only 18 days from physical completion, and, as we have a right to believe, but a link in miles of

road stretching across the same prairie, was not aware of this prior railroad occupation."

We have not stopped to consider an intimation contained in the argument that the court erred in its finding of fact as to the state of construction of the road at the time the entry by Barlow was made, because without at all questioning our power to review the facts in so far as necessary to dispose of the Federal contention, we consider the suggestion wholly without merit, first, because we would not in any event disregard the finding of fact of the court below except upon conviction of clear error committed, for which the record here affords no ground whatever; and second, because as the finding of the court below was also the finding of the trial court, the request invites us to disregard the findings of both courts on a matter of fact in the absence of any ground for a conviction that error of fact was clearly committed.

Affirmed.

SEABOARD AIR LINE RAILWAY *v.* KENNEY, ADMINISTRATOR OF CAPEHART, ALIAS EASON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 269. Argued March 10, 1916.—Decided April 3, 1916.

The Federal Employers' Liability Act, in so far as it deals with the subjects to which it relates, is paramount and exclusive, and recovery under it can be had only in the mode prescribed, and by and for the persons in whose favor it creates and bestows a right of action.

The Federal Employers' Liability Act contains no definition of who are to constitute the next of kin to whom it grants a right of recovery, and the absence of such definition indicates the purpose of Congress to leave the determination of that question to the state law.

There is no merit in the contention that Congress intended that the term "next of kin" was used in the Employers' Liability Act in its common-law significance and as excluding all persons not included in that term under the common law.

The ruling of the state court in this case that the next of kin of an intestate, who was illegitimate, were his half brothers and sisters legitimately born of the same mother, excludes by implication the possibility of an asserted father being the parent and person entitled to recover under the Employers' Liability Act.

167 Nor. Car. 14, affirmed.

THE facts, which involve the construction and application of the Employers' Liability Acts of 1908 and 1910, and the determination of who are the next of kin entitled to maintain an action thereunder, are stated in the opinion.

Mr. Murray Allen for plaintiff in error:

The alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, who are legitimate children of the mother of the deceased employee, who was an illegitimate child, are not the next of kin of such employee within the provisions of § 1 of the Federal Employers' Liability Act.

The surviving father of a deceased employee, who was an illegitimate child, is the parent of such employee within the provisions of said section of the Act.

If the alleged beneficiaries, Sills Hardy, Joe Hardy and Nettie Hardy, are next of kin of the deceased employee, they were not dependent upon such employee, as required by said section.

Allegation and proof of the existence of beneficiaries, as defined by the Federal Employers' Liability Act, are essential to a right to recover damages for the death of an employee.

The expression, "next of kin," as used in the Act, is to be construed in the light of the common law.

At common law the words "parent," "child," "next of kin," and words of similar import, were held to relate only to those who are legitimate.

In construing the expression, "next of kin," as used in the Employers' Liability Act, the application of the principle that words of kindred when used in a statute, relate only to those who are legitimate, is not affected by state legislation regulating the distribution of personal property.

Uniformity in the application of the Employers' Liability Act will be entirely destroyed if the expression "next of kin" is to be defined in accordance with the legislation and judicial decisions of the various States.

If the surviving father of a deceased employee, who was an illegitimate child, is the parent of such employee within the provisions of § 1 of the act, plaintiff is not entitled to recover in this action, because the father of his intestate is living.

Numerous authorities both state and federal are cited in support of these contentions.

Mr. Francis D. Winston, with whom *Mr. J. H. Matthews* was on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

The trial court on the verdict of a jury entered judgment against the plaintiff in error for the sum of $800 for the negligent killing of Capehart who was one of its employees, and this writ of error is prosecuted to reverse the action of the court below affirming such judgment. (167 Nor. Car. 14.) At the time of his death Capehart was a minor and was employed by the defendant company as a switchman. The accident occurred in North Carolina on an interstate freight train moving from a point in North Carolina to one in Virginia. The suit to recover was specifically based on the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, as amended April 5, 1910, 36 Stat. 291, c. 143, and as both parties concede that that act was applicable, that subject may be put out of view.

The deceased was a natural or illegitimate child born in North Carolina, and the next of kin for whose benefit the administrator sued, he having been qualified at the alleged domicile of the deceased in North Carolina, were three minor children of the deceased's mother, the issue of a marriage by her contracted after his birth, she the mother being dead at the time of the accident. There was no question in the court below as to non-liability because of an absence of negligence, since as pointed out by the court the sole contention pressed upon it for reversal was that the damages for the death had been awarded to persons who were not entitled to the recovery as next of kin under the act of Congress, even although they were the next of kin by the law of the State. Thus the court said: "The sole contention of the defendant requiring our consideration, is that the expression 'next of kin,' as used in § 1 of this act [the act of Congress] is to be construed by the common law, disregarding the state law defining those words." After then quoting from the state statute on the subject, the court further said: "It is very clear that in North Carolina the two half brothers and the sister of the intestate are his next of kin. It seems to us immaterial whether it were formerly otherwise in this State, either by statute or the common law before any statute. The question is, who was the 'next of kin' at the time of such death in the State where the wrongful death occurred?" Proceeding to examine and decide this question, it was held that next of kin for the purpose of the recovery under the act of Congress were the next of kin as established by the law of the State where the right to recover obtained. And it is the correctness of this ruling which we are alone called upon to consider, since despite the great number of assignments of error which are made, they all in last analysis depend upon that question. We need not stop to review the assignments to demonstrate this fact, since in argument they are all stated as embracing the solution of three

inquiries, which as we shall see when we consider them, will be virtually disposed of by deciding the single question concerning the correctness of the ruling of the court below as to the next of kin under the statute. The three questions thus stated are in substance as follows: First, whether the minor children who under the law of North Carolina were the next of kin of their natural or illegitimate brother because of their common motherhood were the next of kin under the act of Congress? Second, if in the absence of a parent they were so, would the proof of the existence of an asserted father of the deceased make such person his parent within the act of Congress, excluding the right of the next of kin to recover the damages? Third, if the minor brothers and sister were next of kin under the act of Congress, had they such dependency on the deceased as gave them any right to recover under the act?

We consider the questions separately.

1. There can be now no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under the act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action. *Second Employers' Liability Cases*, 223 U. S. 1; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59; *Taylor* v. *Taylor*, 232 U. S. 363; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 501. But this is irrelevant, since the controversy concerns only the meaning of the act which it is conceded, when rightly interpreted, is entitled to exclusive operation.

Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress

plainly indicates the purpose of Congress to leave the determination of that question to the state law. But it is urged as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning of course the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the States and substituted another law for it, when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition since if it be well founded, it would apply equally to the other requirements of the statute—to the provisions as to the surviving widow, the husband and children, and to parents, thus for the purposes of the enforcement of the act overthrowing the legislation of the States on subjects of the most intimate domestic character and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the States, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.

But we need go no further since the want of merit in the

contention is fully demonstrated by authority. In *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 65, the matter under consideration was § 2269, Rev. Stat., giving to the heirs of a deceased preëmptor who had died before completing his entry the right to perfect the same, the statute providing, "But the entry in such cases shall be made in favor of the heirs of the deceased preëmptor and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The controversy was whether the word heirs under the statute should be taken in its common law meaning and therefore not to give a right to complete the entry to illegitimate children who had been recognized by their father, the preëmptor, and who were his heirs under the law of the State of Kansas where the land was situated and where the deceased preëmptor was domiciled. The court said: "We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words 'heirs of the deceased preëmptor' as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitæ*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. . . . But it is contended that the word 'heirs' was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as

to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the situs of the land and the domicile of the owner" (pp. 68, 69). And there is no ground for taking this case out of the rule thus announced upon the theory that the controversy involved the title to real estate, contracts concerning which are governed by the law of the situs, since we are dealing here with the subject of next of kin which so far as legislative power is concerned under our constitutional system of government is inherently local and to be determined by the rules of the local law. And this is well illustrated by *Blagge* v. *Balch*, 162 U. S. 439, which involved a controversy as to the distribution of French spoliation claims awarded under an act of Congress providing "That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy . . ." Without going into detail concerning the controversy in that case it suffices to say that if the next of kin entitled to take under the act of Congress had been ascertained under the rule of the common law, there would have been one result, and if determined by the law of the State controlling distributions, another and different result followed. Coming to determine the significance of the words "next of kin" from the act itself and its context, the court said (p. 464); "And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective States of the domicile of the original sufferers."

2 and 3. The suggestion rather than contention that if the state law be held applicable to determine next of kin, the right should have been recognized to seek to trace the paternity of the illegitimate child so as to make the

asserted father the parent under the statute, might well be disposed of by saying that no such contention seems to have been urged in either of the courts below. But aside from this, the entire want of merit of the proposition is at once demonstrable from a two-fold point of view: (a) because it was necessarily foreclosed by the ruling of the court below as to the state law concerning the next of kin and the right of the brothers and sister of the illegitimate child to inherit from him solely because of a common motherhood, a ruling which excluded by necessary implication the right now contended for. (b) Because as no provision, either of the state law or of the common law, supporting the asserted right is referred to, the suggestion may be taken as simply a typical illustration of the confusion of thought involved in the main proposition relied upon which we have previously adversely disposed of.

In so far as it is suggested that there was no proof tending to show a dependent relation between the next of kin who were recognized and the deceased so as to justify recovery under the statute, it suffices to say that it was expressly foreclosed by the finding of the jury sanctioned by the trial court and was not questioned in the court below, and at all events involves but a controversy as to the tendencies of all the proof foreclosed by the action of both courts which we would not reverse without a clear conviction of error, which after an examination of the record on the subject we do not entertain. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464.

Affirmed.

FARMERS' & MECHANICS' NATIONAL BANK OF PHILADELPHIA *v.* RIDGE AVENUE BANK.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 291. Argued March 15, 1916.—Decided April 3, 1916.

Under subsection f of § 5 of the Bankruptcy Act of 1898, and after reviewing conflicting authorities in regard to its construction, *held* that when a partnership as such is insolvent and when each individual member is also insolvent, and when the only fund for distribution is produced by the individual estate of one member, the individual creditors of that member are entitled to priority in the distribution of the fund.

THE facts, which involve the construction of the provisions of § 5 of the Bankruptcy Act of 1898, relative to the individual assets of a member of a bankrupt partnership and who are entitled to priority in sharing therein, are stated in the opinion.

Mr. J. Frank Staley for Farmers' & Mechanics' National Bank:

Distribution must be made in strict compliance with clause "f," that is, the creditors of the individual partners are entitled to priority in the distribution of such partner's individual estate. The existence or non-existence of firm assets does not permit or admit of exception to this positive rule. This court has so ruled when it practically refused to review the decisions of the appellate courts in the Second and Fourth Circuits, in the cases of *MacNabb* v. *Bank of LeRoy*, 133 Fed. Rep. 912; *S. C.*, 198 U. S. 583; and *Euclid National Bank* v. *Union Trust Co.*, 149 Fed. Rep. 975; *S. C.*, 205 U. S. 547.

Further this court has recognized the rule of distribu-

tion as above stated to be the established rule and has denied that any exception to the general rule, known as the English exception, exists. *Murrill* v. *Neill*, 8 How. 414.

The decided weight of authority requires distribution to be so made, in strict compliance with clause "f"; the non-existence of firm assets for distribution does not create an exception to the general rule. Three Circuit Courts of Appeals and four District Courts of other circuits have so ruled. The only decisions to the contrary under the act of 1898, are *Conrader* v. *Cohen*, 121 Fed. Rep. 801, and *In re Green*, 116 Fed. Rep. 118 (D. C., Iowa), but the facts in each of these cases were unusual and the decisions based upon such unusual facts.

Mr. Frank R. Savidge for Ridge Avenue Bank:

The equitable principle, commonly called an exception to the general rule, that firm creditors share equally with separate creditors of the partners in individual assets, where there are no firm assets and no living solvent partner, is supported by the best authority.

Lindley on Partnership (8th ed.), p. 811, note, 855; Gilmore on Partnership, p. 438–9; Parsons on Partnership (2d ed.), p. 500; Collyer on Partnership (6th ed.), p. 1459; Storey on Partnership (7th ed.), § 380; see also Loveland on Bankruptcy (1912), § 283; Bispham's Equity (9th ed.), § 517.

In re Janes, 133 Fed. Rep. 912; *Euclid Nat. Bank* v. *Union Trust Co.*, 149 Fed. Rep. 975; *Mills* v. *Fisher & Co.*, 159 Fed. Rep. 897, and other cases cited by appellant lose sight of the intent and purpose of the act, and have adopted the narrow view that as the act contains no express provision as to the manner of distribution to be followed in the absence of firm property, the application of the principle, more than a century old, of permitting firm creditors in such event to participate equally with separate creditors in separate assets would be judicial

legislation, but in this respect the English courts universally apply the exception, where there is no firm estate and no solvent living partner. Lindley on Partnership (8th ed.), p. 855; *Re Carpenter*, 7 Morrell Bankr. Cas. 270; *Ex parte Taitt*, 16 Vesey, Jr., 193. And see also *In re Collier*, Fed. Cases, No. 3002; *Conrader* v. *Cohen*, 121 Fed. Rep. 801.

The term now used in the acts, means the fund remaining after payment of expenses of administering the estate in bankruptcy; in other words, assets distributable to creditors. *In re Litchfield*, 5 Fed. Rep. 47; *In re McEwen*, Fed. Cas. No. 8783; see also Gilmore on Partnership, p. 440.

Firm creditors under the act of 1867 were allowed to participate in separate assets where there was no partnership fund for distribution, and this, regardless of whether the partnership was bankrupt or not. This method of distribution tended to produce the equality which it was the manifest purpose of the act to secure. *In re Jewett*, Fed. Cas. No. 7304; *In re Knight*, Fed. Cas. No. 7880; *In re Downing*, Fed. Cas. No. 4044; *In re Rice*, Fed. Cas. No. 11750; *In re McEwen*, Fed. Cas. No. 8783; *In re Collier*, Fed. Cas. No. 3002; *In re Green*, 116 Fed. Rep. 118.

No decision of the Supreme Court, either in equity or in bankruptcy, has been found, deciding the question as here raised, based on facts identical with or similar to those in this case.

Since the opinion of Justice Daniel in the court below was rendered, the majority of the Federal court, under the Bankruptcy Act of 1867, and those which it is submitted have given the act of 1898 the proper equitable construction, have supported the exception, and it is significant that the majority of the States of the Union sustain the exception in distributing insolvent partnership and individual estates in equity. Among the States allowing it are Alabama (*Smith* v. *Mallory*, 24 Alabama,

628); New Jersey (*Davis* v. *Howell*, 33 N. J. Eq. 72); Missouri (*Level* v. *Ferris*, 24 Mo. App. 445; *Hundley* v. *Ferris*, 103 Missouri, 78); Rhode Island (*Cowell* v. *Bank*, 16 R. I. 288); Wisconsin (*Thayer* v. *Humphrey*, 91 Wisconsin, 276); Maine (*Harris* v. *Peabody*, 73 Maine, 262); Ohio (*Rogers* v. *Meranda*, 7 Oh. St. 179).

The so-called exception is sustained by reason and equity. Gilmore on Partnership, p. 439; *In re Knight*, Fed. Cas. No. 7880.

The extreme injustice which the strict application of the rule, without the exception, may cause, is well stated by the court. *In re Green*, 116 Fed. Rep. 118.

Mr. Chief Justice White delivered the opinion of the court.

The essential facts stated in the certificate of the court below are these: The firm of William Gray & Sons and its three partners, William J. Gray, Peter Gray and Alexander J. Gray, were adjudged bankrupts. The same person was appointed trustee of the four estates. It resulted from charging separately against each estate the mere necessary and unquestioned expenses of administration that there was nothing whatever in the estate either of the partnership, of that of William J. Gray or of Peter Gray,—indeed in the latter there was nothing to defray the expenses of administration. As to the estate of Alexander J. Gray, after charging the expenses of administration there remained $1,597.26. Creditors of the firm proved their debts against it, the Ridge Avenue Bank of Philadelphia being among the number, while only one creditor, the Farmers' & Mechanics' National Bank of Philadelphia, proved a debt against the individual estate of Alexander J. Gray, that debt exceeding the total sum of the estate. No creditor proved against the individual estate of William J. Gray or that of Peter

Gray. Under these conditions the dispute which arose was whether the estate of Alexander J. Gray was to go wholly to the Farmers' & Mechanics' National Bank, the individual creditor, or was to be proportionately applied to the individual and firm creditors because of the absence of any firm estate for distribution. The District Court directed the fund to be distributed between the Farmers' & Mechanics' National Bank, the creditor of the individual estate, and the creditors of the firm, and the question of law which the court below propounds to enable it to review this action of the District Court, is as follows:

"When a partnership as such is insolvent and when each individual member is also insolvent, and when the only fund for distribution is produced by the individual estate of one member, are the individual creditors of such member entitled to priority in the distribution of the fund?"

The solution of this question primarily depends upon an interpretation of subsection f of § 5 of the Bankruptcy Act of 1898, and secondarily upon a consideration of all the pertinent subsections of the section, indeed, of all the relevant provisions of the context of the act. Subsection f is as follows:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

Let us first sift the respective contentions so as to reach the ultimate proposition required to be decided. In the first place, in favor of the right of the creditor of the individual partner to be paid, under the facts stated, out of the individual estate to the entire exclusion if necessary of the creditors of the partnership estate, it is urged that such result is so unambiguously commanded by the rule of distribution established by the text of subsection f that there is no room for construction but the simple duty arises to enforce the text, as to do otherwise would amount to judicial legislation. It is undoubted that this proposition is supported by largely the greater weight of opinion of the courts of the United States in enforcing subsection f. *In re Wilcox*, 94 Fed. Rep. 84 (1899); *In re Mills*, 95 Fed. Rep. 269 (1899); *In re Daniels*, 110 Fed. Rep. 745 (1901); *In re Janes*, 133 Fed. Rep. 912, 67 C. C. A. 216 (1904), reversing 128 Fed. Rep. 527; *In re Henderson*, 142 Fed. Rep. 588 (1906); *Euclid National Bank* v. *Union Trust Co.*, 149 Fed. Rep. 975, 79 C. C. A. 485 (1906), affirming *In re Henderson, supra; Mills* v. *Fisher*, 159 Fed. Rep. 897, 87 C. C. A. 77 (1908); *In re Hull*, 224 Fed. Rep. 796 (1915).

On the other hand, to refute the proposition and to avoid the effect of the authorities sustaining it just referred to three contentions are relied upon. (a) It is said the absence of ambiguity in the general rule as stated in subsection f is conceded and the soundness of the authorities cited recognizing that fact is not disputed, but these concessions, it is declared, are negligible, since the fact that there were no partnership assets and no solvent partner causes this case to be an exception to the rule expressed in subsection f and hence not governed by it and therefore makes it clear that the authorities cited are inapposite because they mistakenly applied the general rule to an exceptional case which that rule did not govern. (b) That this is demonstrated first by the fact that the general rule

was as unambiguously expressed in the previous bankruptcy acts (§ 14 of the act of 1841 and § 36 of the act of 1867) and yet under those acts the exception stated, which unquestionably governed in bankruptcy in England where the general rule was the same, was also held to be controlling by judicial decisions in this country. This being true, the argument insists the inference is that Congress in adopting the act of 1898 without any expression excluding the continued operation of the exception which prevailed under the previous acts, must be considered as having impliedly recognized the continued force of that exception, that is, must be held to have substantially made that exception a part of the rule established under the act of 1898. And this view it is insisted is expressly sustained by the following decided cases under the act of 1898: *In re Green*, 116 Fed. Rep. 118 (1902); *In re Conrader*, 118 Fed. Rep. 676 (1902); *Conrader* v. *Cohen*, 121 Fed. Rep. 801, 58 C. C. A. 249 (1903), affirming *In re Conrader, supra; In re Janes*, 128 Fed. Rep. 527 (1904), reversed in 133 Fed. Rep. 912, 67 C. C. A. 216; and by the present case, *In re Gray*, 208 Fed. Rep. 959 (1913), and is in reason supported by the adjudged cases which upheld the asserted exception under the prior acts.

(c) That even if this be held to be not the case, as there is nothing in the act of 1898 repudiating the application and existence of the exception which prevailed under the previous acts, therefore as a question of original investigation that exception should be held to be equally applicable and controlling under the act now in force as it was under the previous bankruptcy acts, since the general rule was as clearly stated in those acts as it is in this.

A twofold reply is made to these contentions: First, although admitting that the alleged exception prevailed in England, it is denied that it was authoritatively recognized in this country under the previous acts, and second, by insisting that even if it was, it is not applicable under

the act of 1898 because the terms of that act make manifest that it was drawn for the purpose of preventing the method of distribution provided in subsection f from being subject to the exception relied upon.

As we are of opinion that it is to be conceded that if under the prior acts it was settled authoritatively and conclusively that the exception relied upon obtained and was fully recognized in practice, it would follow that the enactment of the same general rule without anything indicating a departure from the exception would justify the conclusion that it was the legislative intent to continue the exception, it results that in order to answer the question propounded the whole case comes to two inquiries: Was there such an authoritative exception to the general rule under the prior laws, and if not was the continued existence of such exception compatible with the rule of distribution established by subsection f of the present act as considered in the light of the context of § 5 of which it forms a part and of the scope and operation of the act of 1898?

1. Undoubtedly in England with the development of the general rule for the distribution of partnership and individual estates in bankruptcy as now formulated in subsection f of the present Bankruptcy Act, there also was evolved in practice the so-called exception here relied upon which was applicable in cases where there was no partnership estate to distribute and no solvent partner. We content ourselves with this statement and do not refer to the adjudged cases in England establishing the rule and those from which the alleged exception came to be evolved since they were quite fully referred to in *Murrill* v. *Neill*, 8 How. 413, and will all be found stated in the fullest degree in the opinion of Lowell, Judge, in *In re Wilcox*, 94 Fed. Rep. 84. It is also true that this asserted exception came to be recognized and applied in adjudged cases in this country under the prior bankruptcy acts.

The cases on this subject again are not referred to because they will also be found stated in the opinion in the *Wilcox Case*. But while this is true, we think there is no ground for saying that the asserted exception had become so authoritatively established prior to the adoption of the present law as to cause it to be in effect a part of the rule, since on the contrary, as will be seen by the references already made, its applicability was constantly disputed and its enforcement challenged. Nothing more is required to demonstrate this statement than a recurrence to *Murrill* v. *Neill*, *supra*, since in the opinion in that case after considering the general rule of distribution as now stated in subsection f and the alleged exception here under review, it was said: "It may be proper in this place to mention the two departures permitted by the Court of Chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion." After then stating the first exception, the one now in question was referred to as follows: "The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country." p. 427.

2. Although the alleged exception was therefore clearly not so authoritatively established as to cause it to become a part of the rule by the enactment of the Bankruptcy Act of 1898, it yet remains to consider whether its existence is compatible with that act, that is, whether to permit it would be in accord with the rights which the act gave and the duty which it imposed to enforce them. In the first

place it is to be observed that the act of 1898 in the opening subsections of § 5 confers the power on courts of bankruptcy to adjudge a partnership a bankrupt and to administer the partnership estate so far as possible as any other estate, an authority not conferred by the previous Bankruptcy Acts. In the second place, subsection f establishing the rule of distribution is immediately followed by subsection g which provides as follows:

"The Court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The legislative mind must therefore have been immediately and directly concerned with the enforcement of the rule of distribution expressed in subsection f, since that subject was thus immediately considered and provided for. And the significance of this provision and its effect upon the continued existence of the supposed authority to depart from the rule expressly provided for by permitting the alleged exception now relied upon will become quite clear by the briefest possible outline of some of the principal considerations involved in the origin and development of that assumed exception.

As pointed out in the opinion in *Murrill* v. *Neill*, *supra*, and as fully shown by the review of the English cases so carefully stated in *In re Wilcox*, *supra*, to which we again refer, that origin and development was this: It came to pass in England at an ancient date that with the establishment of the rule of distribution substantially as formulated in subsection f, it was recognized that a creditor of the joint or partnership estate would be permitted, if no objection was made, to prove his claim in a bankruptcy proceeding against an individual partner. This resulted from the fact that the power of the court over the

separate or individual estate extended not only to the individual assets, but to the share of the individual bankrupt in the partnership assets, the court having power upon application, by ordering separate accounts to be kept, to protect the rights of all and secure a distribution conformably to the settled rule. While there is obscurity and consequent contrariety of opinion as to the reason upon which it was placed, it no doubt came to pass in a further state of evolution that both joint and separate creditors were allowed to prove their claims in bankruptcy against the separate estate, the practice of protecting the rights of each by an order requiring separate accounts disappearing and the creditors being relegated for the accomplishment of that result to a bill in equity to enforce and secure the distribution as provided in the rule. It is further certain that as in every case where an order was made allowing the joint creditor to prove against the separate estate of a partner such right would be frustrated by chancery proceedings, it came to pass that joint creditors were only allowed to prove against the separate estate upon condition that distribution would be made conformably with the general rule in every case where that course could be compelled by chancery proceedings. As it came further however to be appreciated that chancery could not afford relief in a case where there was no joint estate and no solvent partner, it resulted that in such a case the limitation as to distribution was treated as not applicable and therefore the alleged exception to the general rule arose,—an exception which, as pointed out by this court in *Murrill* v. *Neill*, *supra*, was but a failure to give effect to the rule, not because of the absence of right of the creditors to enjoy its benefit, but alone because the judicial power had at its command no remedy which it could apply to give effect to the legal right which undoubtedly existed.

When the origin and source of the so-called exception is thus appreciated and the comprehensive delegation of

authority for the first time conferred by subsection g is considered, it would seem to be fairly inferable that at the very moment of the reëxpression of the ancient rule in subsection f in terms free from ambiguity the means of preventing its frustration in the guise of an exception or otherwise because of an assumed absence of judicial remedy to enforce the rule was provided for. And this being true, it of course results that no possible reason can be found for refusing to give effect to the law by permitting the successful operation of the so-called exception now relied upon. In fact, irrespective of the considerations derived from the origin of such assumed exception to which we have referred, when the positive commands of the statute are considered and the new power conferred by the act as to partnership estates is borne in mind, we see no escape from the conclusion that the powers conferred by subsection g are coincident with the duties which the act imposes and amply efficient to secure and give effect to their performance. This, indeed, was the view hitherto indicated in *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496, where after quoting subsection f of the act it was said:

"To enforce these provisions the act compels (subdiv. d) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (subdiv. e) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and permits (subdiv. g) the proof of the claim of the partnership estate against the individual estate, and *vice versa*, and directs the marshaling of the assets of the partnership estate and the individual estates 'so as to prevent preferences and secure the equitable distribution of the property of the several estates.'" p. 504.

It follows that the question propounded will be answered, Yes.

And it is so ordered.

ARMOUR & COMPANY *v.* STATE OF NORTH DAKOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 258. Argued March 3, 6, 1916.—Decided April 3, 1916.

The statute of North Dakota requiring lard when not sold in bulk to be put up in pails or other containers holding a specified number of pounds net weight or even multiples thereof and labled as specified is not unconstitutional as denying equal protection of the law or as depriving the sellers of their property without due process of law; nor is it, as to packages sent into the State from other States and afterwards sold to consumers by retail, unconstitutional as an interference with, or burden on, interstate commerce.

The net weight lard statute of North Dakota is directed to the manner of selling lard at retail and is not repugnant to the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, which is directed against adulteration and misbranding of articles of food transported in interstate commerce.

27 N. Dak. 177, affirmed.

THE facts, which involve the constitutionality under the commerce, due process and equal protection provisions of the Federal Constitution and the Fourteenth Amendment thereto of the full weight provisions of the statute of North Dakota, relative to the sale of lard in containers and their validity under the Food and Drugs Act, are stated in the opinion.

Mr. N. C. Young, with whom *Mr. Alfred R. Urion*, *Mr. Abram S. Stratton* and *Mr. J. S. Watson* were on the brief, for plaintiff in error.

Mr. Andrew Miller, with whom *Mr. Henry J. Linde*, Attorney General of the State of North Dakota, *Mr. Francis J. Murphy*, *Mr. H. R. Bitzing*, *Mr. Alfred Zuger* and *Mr. B. F. Tillotson* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A statute of the State requires (§ 1) that "every article of food or beverage as defined in the statutes of this State shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this State. . . .

"Section 2 (Weight of Lard). Every lot of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5), pounds net weight, or some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind, as 'Back Lard,' or 'Intestinal Lard.' Every lard substitute or lard compound shall also show, in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this State."

Violations of the act are made misdemeanors with a minimum and a maximum fine increased for subsequent offenses.

In pursuance of the statute the state's attorney for the County of Cass filed an information against plaintiff in error for unlawfully offering for sale and selling to one E. F. Ladd a quantity of lard not in bulk which was put up by the company and sold and delivered to Ladd in a pail which held more than two pounds and less than three

pounds net weight of lard, to-wit, two pounds and six ounces, which pail or container did not have or display on the face label thereof the true net weight of the lard in even pounds or whole multiples thereof but expressed the weight of the lard in pounds and ounces.

A demurrer to the information was overruled and the Armour Company pleaded not guilty. A stipulation was entered into waiving a jury trial and that the issues be tried by the court.

The company was found guilty and adjudged to pay a fine of $100. The judgment was affirmed by the Supreme Court of the State and this writ of error was then allowed by its Chief Justice.

The assignments of error attack the validity of the statute, specifying as grounds of the attack that the statute offends the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and also the commerce clause of the Constitution.

Armour & Company is a New Jersey corporation. It is a packer of certain pork products and has packing plants where it produces lard as an incident to its business in Illinois, Missouri, Iowa and Nebraska. It has no plant in North Dakota but has a branch office establishment in the City of Fargo in that State, to which its goods are shipped in car load lots to be distributed therefrom. The branch at Fargo is under the charge of a local manager.

In October, 1911, the State Food Commissioner went to the company's establishment at Fargo and asked to purchase three pounds of lard. He was sold a pail containing two pounds and six ounces. It was upon this sale as a violation of the statute that the information was filed and for which the Armour Company was convicted and sentenced.

The Supreme Court considered the statute as but a development of other laws passed in the exercise of the

police power of the State to secure to its inhabitants pure food and honest weights, questions which the court thought were "inseparably allied and any argument advanced upon one applies equally to the other." And the court said as the law was drafted by the Pure Food Commission, it might be reasonably assumed, "after twelve years of observation and study" and, further, that "the expert who drafted the law, the legislature who passed it and the Governor who approved it, all thought necessity existed for the measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded on the evidence in this case and upon facts of which this court can take judicial cognizance."

The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. *Rast* v. *Van Deman & Lewis*, *ante*, p. 342; *Tanner* v. *Little*, *ante*, p. 369. It only remains to apply to the present case the principles so announced.

Lard is a very useful product and its many purposes are set forth in the testimony. It was originally sold in the State only in tierces and tubs, that is, in bulk. A demand arose for smaller and more convenient packages and the

Armour Company and other packers responded to that demand and put their lard in three, five and ten pound pails, gross weight, the net weight of lard at first having no indication but subsequently, in obedience to the state laws, being indicated by labels, and in the present case by a small label at two pounds and six ounces. The practice of selling by gross weight is a continuation of the practice of selling by bulk.

The Armour Company asserts an inviolable right in the practice as convenient and useful and free from deception. But experience does not justify such unqualified praise. The practice has its advantages, no doubt, but it is the observation of the officers of the State that it conceals from buyers their exact purchases—there is confusion as to what the price paid compensates, whether lard or tin container.

The Armour Company contests this conclusion and contends that the label upon the package, put on in observance of a law of the State passed in 1907,[1] shows the net weight of the lard, and protects the consumer from imposition while it preserves to the company a useful method of packing and a necessary freedom of business with the public. To this we reply the law of 1907 was deemed necessary to protect the purchaser against the concealment in the method of the packers, the amount of lard not being indicated. Supposedly the requirement was not adequate, and the law of 1911 was passed. However, with a comparison of the laws we have nothing to

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[1] The law of 1907, reproducing the provision of a law passed in 1905, provided as follows:

"Ninth. If every package, bottle or container does not bear the true net weight, the name of the real manufacturer or jobbers, and the true grade or class of the product, the same to be expressed on the face of the principal label in clear and distinct English words in black type on a white background, said type to be in size uniform with that used to name the brand or producer. . . ."

do, nor need we even consider, as the Supreme Court considered, with some reluctance, that the label used by the company was a scant compliance with the law of 1907 if not an evasion of it. We need only deal with the law under review and the justification for its adoption. Evils attended the method of the company which the Food Commission of the State thought should be redressed and which the legislature reasonably believed were definite and not fanciful and in this belief passed the law. And the belief being of that character removes the law, as we have already said, from judicial condemnation; and besides there is nothing in the testimony inconsistent with it.

The testimony of the company was directed at great length to show the advantages of selling in containers over selling in bulk, and the expense to the company of the former and the additional expense which the law would require. And meeting the objection that the company fixed the price of the lard by the gross weight of the package, in other words, as though there were three pounds instead of two pounds six ounces, it was replied that by so doing there was no profit to the company and only a reimbursement of the cost of the tin container and extra cost of putting up the lard in that style of package.

But this does not justify the practice of the company nor establish the invalidity of the law of the State. The advantages are in a sense made a snare and the testimony means no more than that the packer has built up a trade on a system of gross weight which enables it to practice a kind of deception on the purchaser that he is getting three pounds of lard when he is only getting two pounds six ounces, and enables the packer to pay for the container. The evil of the transaction is not in the latter but in the former, that is, in the deception. The correction of the statute is that the lard and the container shall be unequivocally distinguished and the purchaser have the

direct assurance of the quantity of lard he is receiving, knowledge of its price and the cost of the container to him, a means of estimating his purchase free from disguises or the necessity of an arithmetical estimate of what he is getting or paying for upon the market fluctuations of lard and tin. This may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, as the Supreme Court of the State observed, to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it.

There are advantages undoubtedly in packing lard in pails, advantages to the packer and the consumer, but the advantages are not on account of selling by gross instead of by net weight. In other words, all of the advantages will be retained by a compliance with the provisions of the law, that is, by putting up the lard in one, three or five pound packages, net weight, or some multiple of those numbers. It is in the testimony that the packing company furnishes lard in net-weight pails to Park & Tilford, of New York City, that is, in weights of three, five and ten pounds, and has been doing so for a few years.

The equal protection clause of the Fourteenth Amendment is invoked by the Armour Company and the specification is that the law under review "arbitrarily and without reasonable ground therefor singles out lard from all food products" which are sold in packages, such as "prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included, and no natural and reasonable

ground for excluding them and in singling out lard has been suggested."

The range of discretion that a State possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 161. The law of North Dakota does not exceed this power.

It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importation. And it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the State.

Nor do we think that the law is repugnant to the Pure Food and Drugs Act of June 30, 1906 (c. 3915, 34 Stat. 768, 780). That act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the Federal law (*Rast* v. *Van Deman & Lewis*, *ante*, p. 342), and the operation of that law is in no way displaced or interfered with.

Judgment affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 302. Argued March 17, 1916.—Decided April 3, 1916.

Legislation cannot be all-comprehensive, and police statutes otherwise valid may, without being unconstitutional as denying equal protection of the law, contain practical groupings of objects which fairly well present a class, although there may be exceptions in which the evil aimed at is deemed by the legislature to be not so flagrant.

The statute of Arkansas, requiring full switching crews on railroads exceeding one hundred miles in length, is not unconstitutional as depriving a railroad company over one hundred miles in length, of its property without due process of law, or as denying it equal protection of the law, or as an interference with, or burden upon, interstate commerce. *Chicago & Rock Island Ry.* v. *Arkansas*, 219 U. S. 453.

114 Arkansas, 486, affirmed.

THE facts, which involve the constitutionality under the commerce, due process and equal protection provisions of the Constitution of the United States and of the Fourteenth Amendment thereto, of the full switching crew statute of Arkansas, are stated in the opinion.

Mr. Robert E. Wiley, with whom *Mr. Edward J. While* and *Mr. E. B. Kinsworthy* were on the brief, for plaintiff in error:

The act of February 20, 1913, is discriminatory, and denies to plaintiff in error the equal protection of the laws, in violation of the Fourteenth Amendment: *Soon Hing* v. *Crowley*, 113 U. S. 709; *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150; *Yick Wo* v. *Hopkins*, 118 U. S. 350–359; *Southern R. R.* v. *Green*, 216 U. S. 400; *Conway* v. *Union Sewer Pipe Co.*, 184 U. S. 540; 1 Sutherland's Stat. Const. (2d

ed.), p. 366; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79.

The act is arbitrary and unreasonable and repugnant to the due process clause of § 1 of the Fourteenth Amendment. *Adair* v. *United States*, 208 U. S. 161; *Mugler* v. *Kansas*, 123 U. S. 623; *C., M. & St. P. R. R.* v. *Tompkins*, 176 U. S. 167; *Mo. Pac. R. R.* v. *Nebraska*, 217 U. S. 196; *Washington* v. *Fairchild*, 224 U. S. 510; *L. & A. R. R.* v. *State*, 85 Arkansas, 12.

Mr. Henry M. Armistead, with whom *Mr. Ashley Cockrill*, *Mr. Wallace Davis*, *Mr. Hamilton Moses*, *Mr. W. D. Jackson* and *Mr. Gus K. Jones* were on the brief, for defendant in error.

Mr. Justice McKenna delivered the opinion of the court.

An act of the State of Arkansas, entitled "An act for the better protection and safety of the public," provides as follows:

"Section 1. That no railroad company or corporation owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities, shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 2. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this State who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be so construed as to prevent any railroad company or cor-

poration from adding to or increasing their switch crew or crews beyond the number set out in this act.

"Section 3. The provisions of this act shall only apply to cities of the first and second class, and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this act shall be fined for each separate offense not less than fifty dollars, and each crew so illegally operated shall constitute a separate offense."

The railroad company violated the terms of the statute for a day in the City of Hot Springs, and being convicted thereof was sentenced to pay the minimum fine imposed by the statute. The judgment which was entered upon the sentence was affirmed by the Supreme Court of the State. This writ of error was then granted.

The railroad company contends that the statute violates (1) the due process and equality clauses of the Fourteenth Amendment of the Constitution of the United States, (2) that it operates as an interference with interstate commerce and (3) prevents a contest of its validity by the excess of its penalties. Of the last ground it may be immediately said that it is without merit.

The other grounds are in effect disposed of by prior decisions.

In the case of *Chicago, Rock Island & Pac. Ry.* v. *Arkansas*, 219 U. S. 453, a statute of Arkansas was considered which required freight trains to be equipped with crews consisting of an engineer, a foreman, a conductor, and three brakemen, "regardless of any modern equipment or automatic couplings and air brakes. . . ." The statute did not apply to railroads whose line or lines did not exceed fifty miles in length, nor to any railroad, regardless of length of its line, where the freight train should consist of less than twenty-five cars. The statute was sustained on the authority of prior cases against charges of conflict

with the Fourteenth Amendment and the commerce clause of the Constitution. We need not cite the cases relied on or repeat the argument of the court. In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power. *Armour & Co.* v. *North Dakota*, this day decided *ante*, p. 510.

A distinction is asserted between that case and this and it is urged that the operation of freight trains of more than twenty-five cars on the trunk lines may require different provision than the movement of switching operations within terminals. But the basis of both is safety to the public though the urgency in one may not be as great as the urgency in the other.

A more serious objection is that certain terminal companies, one at the City of Helena and one at Fort Smith, do switching for certain connecting trunk lines and yet, by reason of their length being less than one hundred miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary. We have recognized the impossibility of legislation being all-comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant. *Armour & Co.* v. *North Dakota*, *ante*, p. 510; *Miller* v. *Wilson*, 236 U. S. 373, 382, 383.

Judgment affirmed.

INDIAN TERRITORY ILLUMINATING OIL COMPANY *v.* STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 283. Argued March 14, 1916.—Decided April 3, 1916.

A tax upon a lease made is a tax upon the power to make the lease.

Leases that cannot be taxed as an entity cannot be taxed vicariously by taxing the stock of the corporation owning them where the only value of the stock is the value of the leases.

Oil leases of land in Oklahoma made by the Osage tribe of Indians under authority of the Acts of February 28, 1891, and March 3, 1905, are under the protection of the Federal Government, and the lessee is a Federal instrumentality, and the State cannot, therefore, tax its interest in the leases either directly, or as the leases are represented by the capital stock of the corporation owning them. *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292.

43 Oklahoma, 307, reversed.

THE facts, which involve the right of the State of Oklahoma to tax leases made by the Osage Tribe of Indians of lands in that State made under authority of acts of Congress, are stated in the opinion.

Mr. Preston C. West, with whom *Mr. John H. Brennan* was on the brief, for plaintiff in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, *Mr. John B. Harrison* and *Mr. J. H. Miley* for defendants in error, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is whether a certain assignment of a lease and rights thereunder made by the Osage Tribe

of Indians, which lease conferred the privilege of prospecting, drilling wells and mining and producing petroleum and natural gas upon lands in Oklahoma Territory, are subject to a tax assessed under the laws of Oklahoma as the property of plaintiff in error in its capacity of a public service corporation.[1]

Plaintiff in error, herein designated as the oil company, is assignee of the lease and asserts the negative of the question, contending that under the lease and the assignment of the lease it became "a Federal agent, acting under a Federal appointment and authorization, in the development of lands belonging to the Osage Tribe of Indians in the Osage Reservation, and that its business, license or permit as such cannot be taxed by the state government, although its physical properties are always subject to taxation." It rests its contention upon an act of Congress of February 28, 1891 (c. 383, 26 Stat. 794–5), and an act of Congress of March 3, 1905 (c. 1479, 33 Stat. 1048, 1061), which extended the lease to the extent of such portion of the lands as had been sub-leased, namely, 680,000 acres.

By the act of 1891 it was provided, "That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by the authority of

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[1] It is provided by § 7338, Revised Laws of 1910, that "every public service corporation organized, existing or doing business in this State shall on or before the last day of February of each year return sworn lists or schedules of its taxable property as hereinafter provided, or as may be required by the state board of equalization, and such property shall be listed with reference to amount, kind and value on the first day of February of the year in which it is listed; and said property shall be subject to taxation for state, county, municipal, public school and other purposes, to the same extent as the real and personal property of private persons."

the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

The act of 1905 recognized the oil company as the owner by assignment of the lease, which assignment was approved by the Secretary of the Interior, and extended the lease for a period of ten years from March 16, 1906, with all the conditions of the original lease except that from and after that date the royalty to be paid on gas should be $100 per annum on each gas well instead of $50, as provided in the lease, and except that the President of the United States should determine the amount of royalty to be paid to all.

The State opposes the contentions of the oil company and asserts that the lease was "not a grant of any authority, franchise, or privilege to any particular person or corporation, and is merely a permit to the Osage Tribe, authorizing such tribe to lease to any person or any number of persons upon the approval of such lease contract by the Secretary of the Interior." It further asserts that the oil company merely occupied "the position of an independent contractor, acting for itself and in its own behalf, in a contract with the Osage Indian Tribe" and that therefore the relation of principal and agent between it and the Government did not exist.

A statement of the case is as follows: The oil company made a sworn return of what it considered the fair cash value of that part of its property engaged in the public service at $53,835.10. The State Board of Equalization, after a hearing, increased the valuation to $538,350.00, the basis of the order of the board being that the oil company was not protected from taxation by the lease from the Indians. Under the procedure of the State the

oil company appealed from that order to the Supreme Court of the State.

In the latter court a referee was appointed to take testimony and report his findings of fact and conclusions of law. He duly reported the facts and from them also reported as a conclusion of law that the oil company was "liable to taxation by the State of Oklahoma for the full value of its property, tangible and intangible—that is, for the sum of $500,000"; and that it was "not exempt from taxation upon the theory that it is a Federal agent or that it holds a franchise from the Federal Government." And he recommended that judgment be entered fixing the assessment of the oil company's property for taxation for the year 1911 at $447,169.98, this being the difference between the total value of all the property and the amount ($52,830.02) locally assessed.

The report was confirmed, the court adjudging that the property of the oil company be assessed as recommended by the referee.

The question in the case seems to be a simple one. It is given some complexity by the opinions of the court on the hearing and rehearing, which require some reconciliation. It appears from the findings of the referee that on March 16, 1896, the Osage Nation of Indians in Oklahoma Territory entered into a contract with one Edwin B. Foster, by the terms of which Foster had a blanket lease upon the Osage Indian reservation for the sole purpose of prospecting and drilling wells and mining and producing petroleum and natural gas only. The lease was for a term of ten years and was approved by the Secretary of the Interior. By an act passed March 3, 1905, Congress extended the lease as to 680,000 acres for ten years. The lease has therefore expired. Prior to its extension in 1905 the lease was assigned to the oil company.

The oil company has sub-let to more than one hundred persons and corporations and the operations upon most

of the lands covered by the lease have been and are conducted by sub-lessees. A small portion, the amount not appearing, is operated by the company.

By the terms of the lease as extended the sub-lessees are required to pay a royalty of 1/6 of the oil produced upon the property, of which 1/24 goes to the company and 3/24 to the Indians, the payments on behalf of the latter being made to the Indian Agency under and by virtue of the rules and regulations of the Department of the Interior.

The oil company has laid pipe lines upon the leased lands for conveying natural gas and it has been its practice to furnish gas to the sub-lessees for use as fuel for their drilling and pumping operations at a flat rate, the amount of which is not disclosed. The company also furnished gas during 1911 for domestic consumption to the residents of Bigheart and Avant, two small towns in which it had no franchise, in the Osage Nation adjacent to the pipe lines of the company. It also furnished gas to a local corporation in the city of Bartlesville, which company held a franchise for and was engaged in the business of selling gas to the residents of that city and also to a local distributing company at the town of Ochelata for use in the business of the latter company in selling gas to the inhabitants of that town.

By the terms of the contract with the Osage Indians the company was required to furnish gas free to the Osage citizens for use in the public institutions of the Osages under certain conditions named.

The oil company is primarily engaged in the business of oil production and its operations in the gas business are conducted as an incident to the development of the oil territory and the production of oil, and, to some extent, as a matter of accommodation to the citizens of Bigheart and Avant, and other persons residing along the company's pipe lines.

In 1911 the company made a sworn return of $53,835.10 as the actual cash value of that part of its property engaged in the public service by reason of the gas business transacted by the company. This valuation was raised by the Board of Equalization to $538,350.00. Certain of the company's property was returned to local assessors and assessed at $52,830.02. All of its property is situated in Osage and Washington counties, Oklahoma, and the total value of its stock, including all its property, tangible and intangible, on February 1, 1911, was $500,000.

The property returned to the Board of Equalization and to the local assessors did not include the lease, sub-leases, contracts and franchises of the company, but only its physical property, it being contended by the company that such lease, sub-leases, contracts and franchises were not subject to taxation.

The total value of the company's property of every kind located in Oklahoma over and above the amount locally assessed was $447,169.98 on February 1, 1911.

The gas business of the company has not been profitable but has been and is valuable as an adjunct to its oil operations.

Against the confirmation of the report of the referee the court said that the oil company made four contentions: (1) That it was not a public service corporation and that the Board of Equalization was without authority to assess its property. (2) That its oil and gas leases were not property used in any public service rendered by it. (3) That the leases were not subject to taxation in the hands of the lessee or his assigns. (4) That in exercising rights under the laws and by the act of Congress extending the lease the oil company was a Federal agency, or exercised a privilege or franchise granted by the Federal Government, and that the lease, therefore, was not subject to taxation.

The court held, (1) that the company was a public service corporation; (2) that the Board of Equalization

had the power to assess to the company other property than that used in connection with public service; (3) that the oil and gas lease was property and must be assessed in the name of the owner of the lease and not in the name of the lessor; and (4) that by reason of the act of Congress of 1905 the gas, oil and other minerals under the lands remained the property of the Osage Tribe, and that the power of Congress over the property could not be questioned. And, distinguishing between the property of a Federal agent and the operations of such agent, it was held "that the tax sought to be levied was not invalid because sought to be levied upon a Federal agency or upon a franchise granted by the Federal Government; or because it interferes with the power of Congress to regulate commerce between the Indian Tribes."

On rehearing the court modified or changed its view. The changes and the reasons for them are not easy to represent. In the first opinion the report of the referee was confirmed and it was adjudged "that the property of appellant [oil company] be assessed as recommended by the referee in his report." In the second opinion the report of the referee is again confirmed and the estimate of the property of the company at $500,000 held to be sustained by the testimony taken by the referee; but the reasoning of the opinions is quite different. For a statement of the difference we may adopt for convenience that of the Attorney General of the State. He says, " . . . the essential difference between the original opinion and the opinion on rehearing being that in the original opinion it was held that oil and gas leases, as such, constitute property as defined by the Constitution and statutes of the State of Oklahoma, and as such was subject to taxation by said State, while the opinion on rehearing held that oil and gas leases, as such, were not defined as personal property subject to taxation under the statutes of Oklahoma, nor by the Constitution of said State, and, therefore, could not

be taxed as personal property; but that under the statutes the market value of the capital stock of said corporation could be taken into consideration by the State Board of Equalization in assessing the properties of said company and could be properly considered as an element of value in assessing said properties, and that the evidence taken before the referee as to the amount of the capital stock of said company and the market value thereof, together with its tangible assets, was sufficient to sustain the assessment made by the State Board of Equalization."

It is clear that the Board of Equalization and the referee sustaining its action proceeded upon the consideration that the leases constituted taxable property and the first opinion of the court confirming the report of the referee had its basis in the same consideration. That consideration was regarded as untenable in the second opinion but the court adhered to its former conclusion, that is, that the report of the referee should be confirmed. The Board of Equalization, the referee, and the court in its first opinion, regarded the leases as taxable entities. In the second opinion it was held that they could not be so regarded under the constitution of the State, but the court gave them effective representation in the capital stock of the company and the latter then was taken as evidence that the value of the property of the oil company was $500,000. Whether the constitution of the State permits this accommodation we are not called upon to say. We are clear it cannot be permitted to relieve from the restraints upon the power of the State to tax property under the protection of the Federal Government. That the leases have the immunity of such protection we have decided.

In *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, the railroad company was the lessee of certain coal mines, obligating itself to take out annually specified amounts of coal and to pay a stipulated royalty. It proceeded actively

to develop the mines, either directly or through its agent, and took therefrom large quantities of coal and fully complied with the obligations assumed. The State of Oklahoma attempted to tax the company under the law of the State requiring every person engaged in the mining or production of coal to make a report of the kind and amount produced to the actual cash value thereof, and at the same time pay to the State Treasurer a gross revenue tax in addition to the taxes levied upon an *ad valorem* basis upon such mining property, equal to 2% of the gross receipts from the total production. The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duty to the Indians.

The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did. The assessment by the board was of the leases as objects of taxation, having no immunity under Federal law. This was repeated by the referee, and he made it clear that the assessment was so constituted. There was, he reports, a local assessment by the assessors of Osage and Washington counties of $52,830.02, and that the total value of the oil company's "property of every kind located in Oklahoma, over and above the amount locally assessed, was $447,169.98, on February 1, 1911," and he recommended a judgment for the latter amount. And, we repeat, there is no doubt of what elements it was composed. The gas business, he reports, was not "of itself profitable" but was "valuable as an adjunct to the company's oil operations." He was explicit as to what

the stock of the company represented, saying that "the total value of said company's stock, including all its property, tangible and intangible, on the first day of February, 1911, was $500,000." It is manifest, therefore, when the court took the stock as evidence of the value of the property of the company the court took it as evidence of the value of the leases and thereby justified their assessment and taxation. This, for the reasons we have stated, was error.

It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

ACKERLIND, ADMINISTRATOR OF LIND, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 293. Argued March 15, 1916.—Decided April 3, 1916.

Notwithstanding the requirements of § 3744, Rev. Stat., requiring contracts made by the Secretaries of War, of the Navy, and of the Interior to be reduced to writing and signed by the contracting parties, reformation of a contract so executed may be required in a proper case as against the United States, as it may be required notwithstanding the provisions of the Statute of Frauds.

Failure of a contractor to read the contract before executing the contract, the terms of which he had previously seen is not enough to debar him from seeking relief by having it properly reformed.

Although the Court of Claims may not have made findings in terms of certain facts which it has plainly assumed in its decision to be true,

if they are not controverted, and they do appear in the record, it is not necessary to send the case back for further finding.

In this case, *held* that a contract for delivery of coal should be reformed by striking out a clause in the printed form which it had been agreed should be, but by mistake of a clerk had not been, stricken out before execution.

When the Government guarantees only a certain depth of water at an unloading dock, the fact that one vessel of greater draft had unloaded at it, does not amount to proof that all vessels of that draft could do so, the Court of Claims having stated that it did not find as a fact there was generally an available depth of over twenty feet; and a claim for demurrage cannot be based on failure to unload vessels of greater draft than twenty feet of water at that dock.

The provision in the Philippine Tariff Act of March 3, 1905, c. 1408, § 15, 33 Stat. 928, 976, exempting from tonnage dues vessels belonging to, or employed in the service of, the United States, does not apply to vessels that are not under the control of the United States. *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202.

The ground of such exemption being to prevent interference with agencies of the Government, it does not apply to an independent carrier who has simply contracted to deliver freight to the Government.

49 Ct. Cl. 635, reversed in part and affirmed in part.

THE facts, which involve the power of the Court of Claims to reform a contract with the United States and claims for demurrage arising under a contract for delivery of coal, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States:

The contract should not be reformed, as the alleged oral agreement was merged in the written instrument.

The reformation desired would make a different contract from the one executed, and hence is contrary to § 3744, Rev. Stat.

The mistake, if any, lacked mutuality, and for this reason the contract should not be reformed.

The Government is not chargeable with demurrage because it guaranteed only 20 feet of water at the wharf.

The vessels employed being in the service of the appellant were not exempt from tonnage dues. *Beach* v. *United States*, 226 U. S. 243, 260; *Clark* v. *United States*, 95 U. S. 539; *Dermott* v. *Jones*, 2 Wall. 1, 7; *Insurance Co.* v. *Mowry*, 96 U. S. 544, 546; *New Orleans S. S. Co.* v. *United States*, 239 U. S. 202; Opinion of the Comptroller of the Treasury; Philippine Tariff Act, 33 Stat. 928, 976; *United States* v. *N. Y. and Porto Rico S. S. Co.*, 239 U. S. 88.

MR. JUSTICE HOLMES delivered the opinion of the court.

The main point at issue in this case is a claim for the reformation of a contract for the transportation of coal from certain ports in the United States to Manila Bay. It is demanded by the claimant upon the following facts. The terms of such contracts are settled by the Bureau of Equipment. A requisition embodying the transaction is then sent to the Bureau of Supplies and Accounts which prepares a formal contract in writing in accordance with Rev. Stat., § 3744. This section makes it the duty of the Secretaries of War, of the Navy, and of the Interior 'to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties.' In the present case the printed specifications upon which proposals were asked contained the clause "And further that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving." The con-

tractor objected to this clause upon satisfactory grounds and it was agreed that it should be omitted. Through a clerical inadvertence, however, the clause was left in the requisition sent to the Bureau of Supplies and Accounts and the contract was drawn embodying it, and signed by the contractor on March 2, 1905, without careful reading, the precise form having been settled as we have said. This mistake was discovered upon the arrival of several vessels at Cavite, on June 17, 1905, the attention of the Bureau of Equipment was called to it, and the Bureau of Supplies and Accounts was requested to make the necessary change, on June 23. That Bureau notified the contractor that the contract was amended by the omission of the clause. The Government refuses to recognize the amendment, the Court of Claims dismissed the claim for reformation, 49 Ct. Cls. 635, and the claimant appealed to this court.

It hardly is denied and cannot be denied successfully that in a proper case reformation of a contract may be required against the United States notwithstanding the statute that we have quoted, as it may be required notwithstanding the provisions of the Statute of Frauds. *Cramp* v. *United States*, 239 U. S. 221, 230. It is the contract that has been made through the agent authorized to make it that is to be reduced to writing and if a clerk or some other agent makes a mistake we perceive no reason why the writing should not be made to conform to the fact. The contract is not unlawful in the preliminary stage, or even void in a strict sense, but simply not to be enforced against the United States. *United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88. The contract is made with the principal and the several steps are to be regarded as if they all had been taken by him. Here the United States made the contract by the Bureau of Equipment and by its mouth requested the Bureau of Supplies and Accounts to put it on paper and sign it.

What the Bureau of Supplies and Accounts understood is immaterial, it simply followed the requisition of the Bureau of Equipment. There was a mistake made by a clerk in not striking out a printed clause from that requisition. It is as if a principal after making the agreement had taken a printed form and forgotten to draw his pen through the words. The failure of the contractor to read before signing an instrument the terms of which he had seen in print is not enough to debar him from seeking relief. *Equitable Safety Ins. Co.* v. *Hearne*, 20 Wall. 494.

The only ground for hesitation is the purely technical one that the Court of Claims, acting before the decision of *Cramp* v. *United States*, 239 U. S. 221, 232, and probably uncertain whether to send up facts or evidence, has not found in terms certain of the facts that we have stated. It has found that the Acting Chief of the Bureau of Equipment wrote an official letter stating them, and it has assumed them to be true in the decision that it delivered. We understand that they are not controverted if material, and therefore think it unnecessary to send the case back for further findings. The decree of the Court of Claims upon this part of the case will be reversed.

The next question that arises concerns the amount of demurrage to be allowed under the contract as reformed. Undisputed terms of the instrument were: "6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point. 7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel for any detention caused by the Government (through fault of

its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given the commandant before lay days commence." (Then followed the clause stricken out by reformation.) "13. While an average daily discharge of four hundred (400) tons in the stream and six hundred (600) tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime." It is found that one vessel went to the wharf drawing twenty-two feet and six inches, and it is argued that if one could another could, and that under paragraph 13 just quoted, the other vessels should have been docked at that draft and thus have been enabled to deliver 200 tons more a day—that being the difference between wharf and stream. If the argument is correct it would give the claimant $2,217.44 demurrage under the contract as reformed. But as to this it is enough to say that the Court of Claims stated that it did not find the fact of generally available depth of over twenty feet, and therefore it stands unproved in this court.

The only other point argued is that the vessels concerned should not have been required to pay tonnage dues because the Philippine Tariff Act of March 3, 1905, c. 1408, § 15, 33 Stat. 928, 976, exempts from them "a vessel belonging to or employed in the service of the Government of the United States." But it is a sufficient answer that the words do not mean every vessel that carries a ton or a cargo of coal for the Government but only one that is under the control of the United States as explained in *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202, 206. The ground of the exemption is to prevent interference with Government agencies. But an independent carrier, such as the contractor was in this case, is not such an agency, and is not employed in the service of the

Government within the meaning of the law. See *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382. Upon the last two points the judgment of the Court of Claims is affirmed.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

FARNHAM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 107. Argued March 2, 1916.—Decided April 3, 1916.

Where the officers of the United States charged with the matter have refused the offer of a patentee for the use of his invention, and have declined to use it, and, proceeding independently, make and use articles designed by themselves, which the patentee claims embody his invention, there is no implied contract on the part of the Government to pay for the use of the invention; in the absence of such contract the Court of Claims could not take cognizance of the claim of an inventor for infringement of his patent prior to the passage of the act of June 25, 1910.

While the petitions in this case must be dismissed because the claims are based on an implied contract which has not been proved, the judgment of dismissal should be without prejudice to claimant's right to present his claim for infringement of his patent under the Act of June 25, 1910, c. 423, 36 Stat. 851.

49 Ct. Cl. 19, affirmed.

THE facts, which involve a claim against the United States for infringement of patent rights in connection with postage stamp-holders, are stated in the opinion.

Mr. George W. Ramsey and *Mr. Hosea B. Moulton* for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States.

Mr. Justice Hughes delivered the opinion of the court.

The claimant, in the year 1906, brought his petition to recover upon the basis of an implied contract for the alleged use by the Government of his patented invention, consisting of a stamp-holder. The claim was for profits alleged to have been made between April 16, 1900, and June 30, 1905. Another petition was filed, in 1911, upon the same basis, to recover profits for the period between June 30, 1905, and June 30, 1910. Motion to consolidate the two suits, as involving the same issues, was granted. Upon hearing, the court made findings of fact and held that the plaintiff was not entitled to recover. 49 Ct. Cls. 19.

The court found that, under date of January 4, 1898, Letters Patent No. 596,656 had been issued to the claimant for improvement in stamp-holders. Models of the proposed stamp book and an explanatory pamphlet were submitted to the Third Assistant Postmaster-General with the suggestion that the Post Office Department should adopt this method of handling and selling stamps. That officer, on June 17, 1898, returned the books to the claimant, saying: "The Department does not deem it expedient to sell stamps in this way." The claimant on July 14, 1898, replied, stating that the descriptive pamphlet and the model stamp books formerly transmitted did not fully show the invention and that he requested a personal interview. Two days later the Government responded as follows: "Your plan for booking and selling stamps is well understood; your explanation of it could not be clearer; but, as stated in a former letter to you, the

Department does not wish to adopt it." In June, 1899, the adoption of the claimant's device was again suggested to the Post Office Department, and the Department replied that it adhered to its former decision. On July 1, 1899, Edwin C. Madden was appointed Third Assistant Postmaster General and he held office until March, 1907. Soon after his appointment he took under consideration the manufacture and sale of postage stamp books. He designed, without actual knowledge of the existence of the claimant's patent or of the correspondence with the Department relating to it, the stamp book now in departmental use. This stamp book was transmitted by Mr. Madden to the Bureau of Printing and Engraving with an inquiry as to the possibility of its manufacture, the details of manufacture being left to that Bureau. It prepared plans accordingly. After the public announcement that the Department would begin the public sale of two-cent stamps in book form, Mr. Madden learned for the first time that it was claimed that there were letters patent covering the proposed stamp book, and before issuing the same to the public he requested the Assistant Attorney General for the Department to examine all such claims, and letters patent, and to advise him whether his book would constitute an infringement. The Assistant Attorney General advised him to proceed with the public sale as contemplated; that the stamp book to be issued was not covered by any previous patents. Both he and Mr. Madden examined the patents of the claimant, and Mr. Madden also examined the correspondence on file. From the beginning the latter insisted that the invention of the stamp book issued by the Department was his own, being independent of the claimant's patent. In March, 1900, the Third Assistant Postmaster General addressed a letter to the claimant's attorney expressly asserting that the Department's stamp book was not an infringement. It was in these circumstances that the Govern-

ment commenced the manufacture of its stamp books on March 26, 1900.

It is apparent that these facts furnished no basis for a finding of implied contract on the part of the Government to pay for the use of the invention,—the only ground upon which the petitions were cognizable in the Court of Claims. *Schillinger* v. *United States*, 155 U. S. 163, 170; *United States* v. *Berdan Arms Co.*, 156 U. S. 552, 556; *Russell* v. *United States*, 182 U. S. 516, 530; *Crozier* v. *Krupp*, 224 U. S. 290, 303, 304; *United States* v. *Société Anonyme &c.*, 224 U. S. 309, 311. In this view, the consolidated petition was properly dismissed and it is unnecessary to consider the questions which have been argued with respect to actual use and the validity of the claimant's patent. The second petition related to a period extending to June 30, 1910, thus embracing five days after the approval of the Act of June 25, 1910, c. 423, 36 Stat. 851, permitting the recovery from the Government of reasonable compensation in cases of infringement. *Crozier* v. *Krupp*, *supra*. This petition, however, like the first, did not purport to present a case within this Act, but was rested solely upon implied contract. The judgment, however, should be without prejudice to the presentation of any claim the petitioner may have under the statute; and with this modification the judgment is affirmed.

It is so ordered.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

JONES NATIONAL BANK *v.* YATES.

BANK OF STAPLEHURST *v.* SAME.

UTICA BANK *v.* SAME.

BAILEY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 163, 164, 165, 166. Argued April 5, 1915. Restored to docket for reargument June 21, 1915. Reargued January 12, 13, 1916.—Decided April 3, 1916.

Although plaintiff's petition does not refer in terms to a Federal statute which determines defendant's liability, if it appears that the case made is essentially one governed by that statute, the action inherently involves the Federal question of liability under the statute.

Even though the defendant in such a case may have averred in his answer that his liability, if any, must be determined under that statute, that assertion is simply a contention as to essential elements of the plaintiff's claim, and where the State court has denied liability under the Federal statute this court has jurisdiction to review the judgment of the state court under § 237, Jud. Code.

Under the local practice in Nebraska, where trial by jury is waived in an action at law, the findings made by the trial court have the same force and effect as the verdict of a jury, and the hearing in the Supreme Court is not a trial *de novo;* and where the judgment of that court, reversing a judgment of the trial court in favor of the plaintiff, is upon the ground that the plaintiff's case is legally insufficient under the Federal statute, the questions in this court are whether the findings of the trial court were supported by substantial evidence and justified recovery under the Federal statute.

The trial court, having found that defendants had knowingly made false statements as to the condition of a national bank of which they were directors, and that plaintiffs were entitled to recover from defendants their losses by reason of their reliance thereon, this court reverses the Supreme Court of the State and affirms the judg-

ment of the trial court; and *held*, that plaintiffs, as creditors of a national bank, may recover from those directors who knowingly made statements required by the National Bank Act that were false or who knowingly permitted, assented to and allowed the same to be made and published; and also *held* that in this case the findings of the trial court as to the condition of the bank and the knowledge by the defendant directors of the falsity of the statements made and published under the Federal statute, and the reliance thereon by the plaintiffs, were supported by substantial evidence.

93 Nebraska, 121, reversed.

THE facts, which involve the right of creditors of a national bank to recover their loss from the directors of the bank, are stated in the opinion.

Mr. J. J. Thomas, with whom *Mr. L. C. Burr* and *Mr. A. B. Hayes* were on the brief for plaintiffs in error.

Mr. Halleck F. Rose and *Mr. Frank E. Bishop*, with whom *Mr. Frank M. Hall*, *Mr. Joseph F. Stout* and *Mr. Arthur R. Wells* were on the brief, for defendants in error:

The findings of the state court are not subject to review in this court. *Dower* v. *Richards*, 151 U. S. 658; *Miedreich* v. *Lauenstein*, 232 U. S. 236.

The printed bill of exceptions does not contain all of the evidence and cannot be reëxamined to change the findings of fact. *Yates* v. *Jones National Bank*, 206 U. S. 158; *Kansas City R. R.* v. *Albers Co.*, 223 U. S. 573; *Creswell* v. *Knights*, 225 U. S. 246; *So. Pac. Co.* v. *Schuyler*, 227 U. S. 601; *Carlson* v. *Curtiss*, 234 U. S. 103; *United States* v. *Copper Co.*, 185 U. S. 495; *Kinney* v. *United States Co.*, 222 U. S. 283; *Grand Trunk Ry.* v. *Cummings*, 106 U. S. 283.

The judgment of the state Supreme Court upon the vote of the four judges does not deny the plaintiffs any Federal right and the motion for rehearing with only three judges in its favor must fail for lack of majority of the court and is not reviewable in this court. *Shumway*

v. *State*, 82 Nebraska, 152; *Consolidated Co.* v. *Norfolk*, 228 U. S. 230; *Iowa Central R. R.* v. *Iowa*, 160 U. S. 389; *West* v. *Louisiana*, 194 U. S. 258; *King* v. *West Virginia*, 216 U. S. 92; *Carmichael* v. *Eberle*, 177 U. S. 63.

The petitions do not state a cause of action against the defendants. *Yates* v. *Jones National Bank*, 206 U. S. 158.

Revised Stat., § 5239, requires a knowing violation of its provision in order to establish liability. *McDonald* v. *Williams*, 174 U. S. 397; *Potter* v. *Hill*, 155 Missouri, 232; *Utely* v. *Hill*, 155 Missouri, 232; *Mason* v. *Moore*, 79 N. E. Rep. 932; *Spurr* v. *United States*, 161 U. S. 728; *Rosen* v. *United States*, 161 U. S. 29; *South Company* v. *Silva*, 125 U. S. 247; *Thomas* v. *Taylor*, 224 U. S. 73.

The directors of a national bank are not obliged to manage or to administer its affairs, and are not responsible for the acts of its officers and agents which they did not knowingly participate in or assent to. *Briggs* v. *Spaulding*, 141 U. S. at 162.

The director does not attest the official report at his risk of its being false. He is not responsible without knowledge of its falsity. *Yates* v. *Jones Bank*, 206 U. S. 179; *Briggs* v. *Spaulding*, 141 U. S. 147.

The Nebraska Supreme Court correctly understood and applied the rule of liability of directors derived from the National Bank Act to the evidence. *Yates* v. *Jones Bank*, 93 Nebraska, 121.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Capital National Bank of Lincoln, Nebraska, suspended payment on January 21, 1893. The plaintiffs in error were unpaid depositors and brought these actions against directors of the bank to recover damages attributed to false representations of the bank's condition. With their denials of breach of duty, the defendants averred that their liability, if any, was to be determined

by the provisions of the National Bank Act. Judgment in favor of the plaintiffs, upon the verdict of a jury, was affirmed by the Supreme Court of the State. *Yates* v. *Jones National Bank*, 74 Nebraska, 734. It was held that the actions were for deceit, at common law, and the judgments were sustained upon that ground. Upon writ of error the judgments were reversed. 206 U. S. 158, 181. It was the view of the court, even if it were conceded "that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the National Bank Act, that such latter statements were counted upon in the amended petition and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof." *Id.*, p. 171. It was therefore concluded that the recovery had been based upon conduct of the defendants in the discharge of duties imposed by the Federal statute; that, with respect to such conduct, the statute (Rev. Stat., § 5239) furnished an exclusive test of liability; and that this test had not been applied. It was held that responsibility, by the terms of the statute, arose from its violation 'knowingly' and hence that 'something more than negligence is required, that is, that the violation must in effect be intentional.' *Id.*, pp. 179, 180.

Upon remand, the petitions were amended but there was no material change in the nature of the causes of action. By agreement, the several cases were tried together; and trial was had by the court without a jury. Official reports, as published, of the condition of the bank were introduced in evidence. Two of these (of December 28, 1886, and December 9, 1892) had been annexed to the petition, and the allegations were broad enough to embrace others. It appeared that the official reports of December 28, 1886, December 12, 1888, September 30,

1889, July 9, 1891, December 2, 1891, and December 9, 1892, had been attested by the defendant Yates; those of September 25, 1891, and September 30, 1892, by Ellis P. Hamer, the intestate of the defendant, Louisa Hamer; and those of December 28, 1886, August 1, 1887, October 2, 1890, December 19, 1890, and July 9, 1891, by the defendant, David E. Thompson. Each of these statements showed the capital stock intact and also surplus and undivided profits.

On behalf of the defendants, Yates and Hamer, the following special findings among others were requested:

"III. That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

"IV. That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank.

"IX. That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities.

"X. That neither the defendant Charles E. Yates nor the deceased Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case."

The trial court found "against each of the defendants and in favor of the plaintiff" respecting the third and fourth requests. On the ninth request, the court answered "in the negative" as to the report of December 28, 1886, and "in the affirmative" as to the report of December 9, 1892; and on the tenth request, the court found "in the affirmative." These rulings 'in the affirmative' were taken to be findings against these defendants, each of whom at once (on a motion to set aside the findings and for a new trial) filed exceptions,—the defendant Yates stating that the court "erred in finding against defendant on the ninth request as to report Dec. 9, 1892," and each of the defendants, Yates and Hamer, stating that the court "erred in finding against defendant on the tenth request."

Among the requests for findings submitted by the defendant Thompson were the following:

"4. Whether this defendant at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency and referred to in the petition or the evidence were in any material respect false and untrue.

"5. Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

"6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

"7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently and with actual personal

knowledge that such reports or any one of them were in any material respect false and untrue."

As to the fourth request, the trial court found "in the affirmative," and the defendant Thompson filed his objection that the finding was "not sustained by sufficient evidence" and was "not consistent with the findings made in response to the sixth and seventh requests." As to the fifth request the trial court found "that the defendant attested only five reports mentioned in said request." As to the sixth and seventh requests, it was found:

"Respecting the sixth and seventh requests of the defendant the Court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, but in attesting such reports the Court finds that the defendant relied upon the statements made to him by the president and cashier of the bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the Court finds that the same were not made in good faith."

The trial court upon its own motion found in each case, as to all the defendants, as follows:

"The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time its liabilities exceeded its assets by more than a million dollars.

"The Court finds that from and after September, 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names and with their sanction and consent.

"The Court further finds that the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, from and after September, 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in plaintiff's amended petition alleged, and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the bank to be in a sound, solvent and prosperous financial condition when in fact it was at all times wholly insolvent and unable to pay its liabilities."

It was further found "that the allegations of plaintiff's amended petition are true." The trial court, as to each of the defendants, also set forth its conclusion that the plaintiffs were entitled to recover "in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act," and fixed the damages sustained. Motion for a new trial was denied.

Upon appeal, the judgments in the several cases were reversed by the Supreme Court of the State, and the actions were dismissed. 93 Nebraska, 121. The appeals were heard by six judges, two of whom dissented from the conclusion reached. Three judges concurred in one opinion (delivered by Hamer, J.), taking the view that the amended petitions contained "no material additional statement of facts," that they "still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery," and that the plaintiffs "having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain," were not entitled to recover under the decision of this court as to the rule of liability established by the Federal Act. *Id.*, pp. 123, 130. The remaining judge (Letton, J.), whose concurrence was essential to the reversal, stated his views in a separate opinion. After pointing out that the issues were the same as when the case was presented to this court on the former writ of error, and that this court had held that a Federal question was involved, he said:

"I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that, under the holding of the Supreme Court of the United States as to the meas-

ure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone, I concur in the conclusion." *Id.*, p. 131.

The appellees moved for a rehearing contending, in part, that the court had erred in denying to them "the right to recover under the national bank laws." On this motion the court was equally divided and the motion was denied. And these writs of error to review the judgments of reversal and dismissal have been prosecuted.

1. It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. *Thomas* v. *Taylor*, 224 U. S. 73, 78, 79; *Grand Trunk Rwy.* v. *Lindsay*, 233 U. S. 42, 48. It was alleged that statements published by the defendants, acting as directors and officers of the bank, with respect to its financial condition, were false, and were known to be false, and were made with intent to deceive plaintiffs and others. Two of these statements—official reports formally attested—were, as we have said, annexed to the petitions. The proof of representations chiefly concerned these reports and others of a similar sort. In contemplation of law, the question upon the case made by the plaintiffs was essentially one as to the liability of these directors for conduct governed by the Federal Act. The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions. Recognizing that these must be deemed to rest upon transactions falling within the purview of that statute, and that the plaintiffs' rights must be measured accordingly, the Supreme Court of the State reversed the judg-

ments and dismissed the actions. Although the defendants alleged in their answers that if any liability attached to them as directors it was determined by the Federal Act, the construction of which was necessarily involved, this was not properly speaking a matter of affirmative defence. What is called the defendants' assertion of Federal right was simply their contention as to the essential elements of the plaintiffs' cause of action. In *Thomas* v. *Taylor, supra*, the case was framed in deceit under the common law, but the appellate courts of the State decided "that it was the facts pleaded and not the technical designation of the action which constituted grounds of recovery." We accepted that decision, saying: "There is nothing in the national banking laws which preclude such view. Those laws are not concerned with the form of pleadings. They only require that the rule of responsibility declared by them shall be satisfied." If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction.

2. It is apparent that there were no findings of fact by the Supreme Court of the State. The actions being at law and trial by jury being waived, the findings of fact made by the trial court—as we understand the local practice—had "the same force and effect" as the verdict of a jury. *Citizens Ins. Co.* v. *Herpolsheimer*, 77 Nebraska, 232; *Dorsey* v. *Wellman*, 85 Nebraska, 262; *Darr* v. *Hay Co.*, 85 Nebraska, 665; *Madison Bank* v. *Gross*, 98 Nebraska, 684. It was not a case of a trial *de novo* upon appeal as in an equity suit. *First National Bank* v. *Craw-*

ford, 78 Nebraska, 665. But, apart from these considerations, findings of fact by the Supreme Court would necessarily require the action of a majority of that court, and it is plain that the opinion of the three judges, unaided by the concurrence of the fourth, could not be regarded as embodying such findings. Justice Letton, whose concurrence in the result made the reversal possible, stated specifically the sole ground of his action, and his statement did not purport to be the resolving of questions of fact. After saying that he was inclined to the view that the evidence would support a judgment upon a cause of action at common law for deceit, and that "the findings of the district court" were "to that effect," he added that he was not satisfied that these findings were "unsustained by the evidence." He considered the presumption to be that they were "so sustained," but he had "not examined the evidence so critically as would be necessary to determine this," for the reason that in view of the holding of this court "as to the measure of duty and of liability of directors" under the Federal Act he thought that "a case had not been made." "For that reason alone" he concurred in the conclusion.

It is manifest that this was simply the expression of an opinion with respect to the legal sufficiency of the plaintiffs' case. That is, the decisive ruling—upon which the reversal rested—was that as matter of law, applying the Federal statute, the plaintiffs were not entitled to their recovery. And the judgment as entered upon appeal simply set forth that the court finding "error apparent in the record of the proceedings and judgment" reversed and dismissed.

In this state of the record, for the purpose of determining whether in thus reversing the judgments and depriving the plaintiffs of their recovery, the Federal question was wrongly decided, there are two questions to be considered (a) whether the facts found by the trial court

justified a recovery under the Federal law, and, if so, (b) whether there was substantial evidence to support these findings, as the duty to decide the Federal question in its very nature involves this further inquiry. *Dower* v. *Richards*, 151 U. S. 658, 667; *Stanley* v. *Schwalby*, 162 U. S. 255, 277, 278; *Kansas City Southern Rwy. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591, 592; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248, 259; *Carlson* v. *Curtiss*, 234 U. S. 103, 106.

3. In addition to the general finding in each case that the allegations of plaintiffs' amended petition were true, we have noted that the court found specially that the bank had sustained losses greatly in excess of its purported capital stock; that it never "had any capital stock, undivided profits or surplus"; that it "was at all times insolvent and so continued up to the time it ceased to do business on January 21, 1893", when "its liabilities exceeded its assets by more than a million dollars;" and that the published statements shown by the evidence, embracing the official reports to which reference has been made, represented the bank to be "in a sound, solvent and prosperous financial condition" when in fact it was "wholly insolvent and unable to pay its liabilities." The official reports covered by the findings were those made to the Comptroller of the Currency and published at the times we have mentioned in pursuance of Rev. Stat., § 5211.[1]

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[1] "SEC. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five

While, as pointed out on the former writ of error, the act did not expressly require that these reports "should contain a true statement of the condition of the association," yet "by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited." 206 U. S., p. 177. And as it is plain that the making of these official reports, found to be false, was a violation of the statute, the question is whether the findings make a case within § 5239 of the Revised Statutes, which provides that where the statute is "knowingly" violated or is "knowingly" permitted to be violated, as stated, "every director who participated in or assented to" such violation shall be liable individually for all damages thereby sustained by "the association, its shareholders, or any other person,"—a civil liability which may be enforced in the state court. *Id.*, pp. 180, 181.

As to the directors Yates and Hamer (the former having attested an official report to the Comptroller of the Currency as late as December 9, 1892, and the latter having attested an official report of September 30, 1892), the trial court not only found "against each of the defendants and in favor of the plaintiff" upon the special requests for findings that these directors did not knowingly participate in the violation of the act, but the trial court also found explicitly that each of these directors "from

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days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

and after September, 1891" knew that the official statements as to the bank's financial condition which were shown by the evidence to have been published "contained material false representations of the financial condition of said bank, and were in fact false and untrue," and that these directors with knowledge "of all the matters and facts aforesaid" had "knowingly permitted, assented to, and allowed the same" to be made and published. The findings as to each of these directors abundantly supported the plaintiffs' recovery within the established rule of liability.

With respect to the defendant Thompson (the latest official report attested by him being the one of July 9, 1891), we have seen that the court found that he had "no actual personal knowledge of the truth or falsity" of the reports which he attested, but that in attesting them he "relied upon the statements made to him by the president and cashier" of the bank "without any investigation," and that "at the time of attesting such statements" he "knew that he had no personal knowledge" of their truth or falsity, and that they "were attested recklessly and without performing his duties as a director" to ascertain their truth or falsity before attestation, and in this respect that these reports "were not made in good faith." If this finding, fairly construed, did not import more than mere neglect or inattention, it would not be sufficient to sustain a recovery; for Congress did not make negligence the test of liability, but the fact that the act was violated knowingly, although there may be a violation "in effect intentional," and therefore within the statute, "when one deliberately refuses to examine that which it is his duty to examine." *Thomas* v. *Taylor*, *supra*. In that case the directors, having been warned by the bank examiner and Comptroller of the doubtful character of certain assets, still represented them to be good; and their reckless report in disregard of the official direction was found to have the

quality of an intentional breach of the defined duty. But in the present case, we are not called upon to determine what should be deemed to be involved in the finding that the attestation of the earlier reports, which were attested by this defendant, was made "without any investigation" and "recklessly." For there were later reports made on behalf of the bank and the defendant is not excused simply by the fact that he did not attest them. His liability was not merely with respect to attestation, but for knowingly "participating in" or "assenting to" the violation of the Act. 206 U. S., pp. 177–179. If the defendant Thompson participated in or assented to the making and publication of the official reports to the Comptroller of the Currency, which were made in the year 1892, knowing that they were false reports, he was liable to the plaintiffs deceived and damaged thereby under the express terms of the statute; and he could not escape this liability simply because, while he thus participated or assented, other directors gave the formal attestation. And the trial court found, not only with respect to Yates and Hamer, but as to the defendant Thompson, that each of them after September, 1891, knew that the official statements as to the condition of the bank, shown by the evidence, were in fact false, and that with knowledge of the facts stated in the findings with respect to the condition of the bank, the defendant Thompson, as well as the others, "knowingly permitted, assented to, and allowed" the same to be made and published. This was a sufficient finding of the ultimate fact of participation or assent, and constituted an adequate basis for recovery.

We conclude that the findings of the trial court, in the light of the Federal statute, supported the judgments it entered.

4. The plaintiffs in error, however, are not entitled to complain of the reversal as a denial of Federal right, even though the judgments were supported by the findings of

fact made by the trial court, if these findings themselves were not supported by substantial evidence.

As to the financial condition of the bank, there is no room for controversy. It would be difficult to conceive of a case of more-scandalous maladministration than that which the testimony portrays. There was evidence of manipulation of accounts, of fictitious and falsified entries, of fraudulent concealments. It cannot be said that there was serious effort to meet this evidence. There was no attempt to palliate the offences which it appeared had been committed by the executive officers in the conduct of the bank's affairs. But these directors were not accountants; presumably they relied upon the books as containing accurate items, and there is no basis for the conclusion that they had knowledge of fictitious or falsified entries in the books, or of the fraudulent transactions which such entries were intended to conceal and which were revealed after the bank failed. With respect to such concealed transactions, we find nothing to show that the directors knowingly participated in, or assented to, a violation of the statute.

We pass, therefore, to matters of a different sort which lay easily within the ken of the directors. The bank had been incorporated as the Marsh National Bank, in the year 1883, with a capital stock of $100,000. The assets and liabilities of a preceding concern, Marsh Brothers, Mosher & Company, were transferred to the bank and became its assets and liabilities. In 1884, the name was changed to the Capital National Bank of Lincoln; the capital stock was then increased to $200,000, and in 1886 there was a further increase making the total capital stock $300,000. Yates, Hamer and Thompson became directors in 1884 and continued as such until the failure of the bank in January, 1893. There were seven directors in all, including C. W. Mosher, the president. It appears that, at the time of the failure, the bank's assets at their face

value, as shown by the books, were about $1,031,000. The liabilities, as shown by the books, including capital stock, amounted to about $1,017,000; these seem to have been in fact (including liabilities on rediscounts) about $1,760,000. Included in the assets above stated, the amount of $850,959.86 (in face value) was in bills receivable, of which $155,560.84 were classed by the receiver as doubtful and $397,073.63 as worthless. The actual showing on liquidation appears to have been even worse; the total amount realized from the bills receivable (aggregating $850,959.86) was $229,520.82, and the total amount realized from all the assets of the bank (including rediscounted items placed in the hands of the receiver for collection, and excluding stock assessments) seems to have been less than $400,000.

The evidence was that at the time of the failure there were on hand worthless notes of C. W. Mosher, the president, amounting to $85,281.67; of the cashier, R. C. Outcalt, $54,166.96 (less an offset of $570.99); and of the Western Manufacturing Company (signed by E. Hurlburt, Jr., Manager) $235,000. This concern was apparently but another name for C. W. Mosher; the testimony is that it had no assets and ceased to do an active business in 1889. There were also notes in the name of E. W. Mosher aggregating $107,085.45, which it was testified were worthless, save for a collection on collateral of less than $10,000. According to the schedules in evidence these worthless notes had been taken since June 1, 1892, that is, within a period of seven months before the failure. And while the totals of these accounts, respectively, were much larger than they had been formerly, the same accounts embracing loans to a considerable amount had long been carried and were included in the published reports. There was evidence that there had been about $200,000 of worthless notes in these accounts in January, 1892. While it is not necessary for the present purpose to

go further back, the testimony supports the finding of the trial court that the bank in fact not only had no surplus or undivided profits, but that its actual condition was one of insolvency.

In the fourteen months before the failure the evidence shows three of the official reports made to the Comptroller of the Currency and published in the newspapers in Lincoln; those of December 2, 1891, September 30, 1892, and December 9, 1892. The total resources in these reports are stated, respectively, as $1,143,946.88, $1,033,561.11, and $1,074,867.37. Each of these reports shows the capital stock unimpaired. As of December 2, 1891, the surplus is stated to be $32,000, and the undivided profits, $23,276.89; as of September 30, 1892, these items are $6,000 and $11,978, respectively; and as of December 9, 1892, $6,000 and $21,180.75. In January, 1892, the directors declared a dividend of five per cent, and in July, 1892, a further dividend of four per cent. There was evidence of serious discrepancies between the items in the published official reports and corresponding items as shown by the books. Without attempting to state the details disclosed by the voluminous record, it is sufficient to say that it was clearly shown by evidence substantially undisputed that these reports constituted grossly false representations of the bank's financial condition upon which the plaintiffs were invited to rely and did rely.

There was also substantial basis for the finding that the directors assented to the making and publication of these reports; for, as we have said, whether this or that director attested a particular report is not controlling upon the question of assent. The official reports required by law are the reports of the bank and not simply of those signing and attesting. As the reports of the bank, they are made under its authority and presumably with the assent of the board of directors. Taking the proved circumstances into consideration, and particularly in the light of the

activity of these directors, to which we shall presently refer, it is hardly conceivable that they did not know of the last-mentioned official reports which were made on behalf of the bank and published in Lincoln. Certainly, the fact of such knowledge on the part of each of them could properly be found. There is no suggestion that they made the slightest objection to the making or publication of these reports and the evidence was unquestionably sufficient to show their assent to this action on behalf of the bank.

The remaining question is with respect to the evidence of the knowledge of these directors of the falsity of these official reports or of such reckless disregard of the truth or falsity of their contents, as would show that the participation in, or assent to, the violation of the statute was "in effect intentional." Under date of September 8, 1891, the Comptroller of the Currency addressed a letter to president Mosher referring to a report of an examination of the bank and criticizing various matters. It was evidently in view of this communication that the trial court took September, 1891, as the time after which the directors had knowledge of facts showing the falsity of the reports. Without reciting the letter in full, it is sufficient to note that the Comptroller called attention to two loans (one being that of E. W. Mosher) exceeding the statutory limit; to the fact that at the time of the last report of the bank the overdrafts shown by the books largely exceeded those stated in the report; to overdue paper, with the statement that such of it as was good should be collected or made active by renewal with satisfactory security; to the excess of current expenses over undivided profits; and to the fact that the bank had a large liability on account of rediscounted paper, said to be caused by the falling off in deposits. It was suggested that some of the loans should be called in as soon as practicable, and the letter closed with the statement that

according to the examiner's report the board of directors had held only two meetings during the past year and that there was "no record of their having examined or approved of the loans and discounts." It was pointed out "that the conduct of affairs of a national bank is by law devolved upon the board of directors and that regular and frequent meetings are therefore very desirable." The defendants insist that they were not apprised of this letter until after the failure. There was evidence tending to show that it was considered at a meeting of the board in September, 1891, but in addition to explicit denials there was testimony to impeach the credit of the witness so testifying. There was, however, another letter from the Comptroller of the Currency under date of February 16, 1892, which admittedly was brought to the attention of the directors. This letter, in substance, repeated several of the criticisms which had been made in the earlier letter; it referred to the desirability of collecting as soon as practicable loans that had been carried for a number of years, and to the agreement of Mosher and Outcalt to reduce their liabilities and to close "the bulk of their outside interests" owing to which the business of the bank had suffered; it again emphasized the duty of the directors with respect to the conduct of the bank's affairs; and it concluded with a request for a reply over the directors' "individual signatures." The directors, including those whose liability is now in question, accordingly signed a reply, under date of February 19, 1892, which purported to furnish explanations and promised improvement. It was stated that the bank had always had a discount committee and that a vacancy caused by the death of a former member had been filled by the appointment of E. P. Hamer. The last-mentioned director also wrote to the Comptroller on February 23, 1892, to the effect that the manner of conducting the bank had not been satisfactory to him and, promising better man-

agement, he added: "Your letter is a move in the right direction, it indicates that we the directors should take a more positive position in the management which I for one shall do."

Apparently the Comptroller of the Currency was not satisfied. For it appears that he wrote another letter under date of August 31, 1892, which, having been lost, was not introduced in evidence. But the letter in reply, which the directors, including Yates, Hamer and Thompson signed individually (under date of September 19, 1892, as stated by defendants' counsel), is in evidence and its significance cannot be overlooked. Among other things, it stated:

"The dividend of July 1st was all right; the expenses since then have exceeded income by reason of having paid taxes & interest on certificates of deposits to an unexpected amount during July. The item of $8,000.00 losses referred to was an estimate of contingent losses & not any particular loss already incurred, but referred to some matters or process of liquidation, all items mentioned by you shall receive prompt attention."

There was thus sufficient evidence from these directors themselves that they were scrutinizing the affairs of the bank; that prior to the published official report of September 30, 1892, which was followed by the published official report of December 9, 1892, these directors were examining the condition of the bank, that they were considering the losses sustained, the expenses incurred, and the basis of the dividend declared in July. These were not casual statements, but deliberate assertions of activity of supervision in response to official complaint. It was plainly permissible, despite their disclaimers and denials, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they pro-

fessed to be actively exercising. Assuming that they were ignorant of the frauds that had been committed and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive. The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial court. *Citizens Ins. Co.* v. *Herpolsheimer, supra; Madison Bank* v. *Gross, supra.* It is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial court, at least with respect to the last mentioned reports, had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error.

The judgments of the Supreme Court of the State are reversed and the cases are remanded with instructions to reinstate the judgments entered in the District Court which are affirmed. *Stanley* v. *Schwalby,* 162 U. S. 255, 279–283.

It is so ordered.

DETROIT AND MACKINAC RAILWAY COMPANY *v.* MICHIGAN RAILROAD COMMISSION AND FLETCHER PAPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 68. Argued November 10, 1915.—Decided April 3, 1916.

A judgment or decree which determines the particular cause is final in the sense of § 237, Jud. Code.

A proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is final within the meaning of § 237, Jud. Code.

The granting of a writ of mandamus to maintain or restore the *status quo* by requiring a railroad company to comply with an order of the State Railroad Commission of Michigan, which, under the statute of the State was *prima facie* lawful, pending the determination of a suit in equity brought by the railroad company to enjoin enforcement of the order, *held*, in view of the circumstances and requirement that a bond of indemnity be given, not to deprive the railroad company of due process of law guaranteed by the Fourteenth Amendment.

178 Michigan, 230, affirmed.

THE facts, which involve the constitutionality under the due process provision of the Fourteenth Amendment of an order granting a writ of mandamus enforcing obedience to an order of the Michigan Railroad Commission directing a railroad company to relay tracks removed by it from a logging spur, are stated in the opinion.

Mr. Fred A. Baker and *Mr. James McNamara* for plaintiff in error submitted:

It was not competent for the Supreme Court of Michigan while the case in the Wayne Circuit was pending and undetermined to order the railroad company to restore the Tubbs Branch and to resume service thereon.

The failure of the Michigan Railroad Commission to carry out its agreement to give a further hearing and an opportunity to introduce evidence, and the refusal of the Supreme Court of Michigan to give any such opportunity was a deprivation of property without due process of law and a denial of the equal protection of the laws.

The indemnity bond of $10,000 does not cure the error of the Supreme Court of Michigan in awarding the mandamus.

On the answers of the railroad company the Tubbs Branch has always been, and as proposed to be restored will certainly be, private and not public.

The Detroit & Mackinac Railway Company was at liberty whenever it saw fit to withdraw the Tubbs Branch from its alleged public use.

In support of these contentions, see *Arson* v. *Murphy*, 109 U. S. 238; *Barney* v. *Watson*, 92 U. S. 449; *Berrien Power Co.* v. *Circuit Judge*, 133 Michigan, 48; *Chicago &c. Ry.* v. *Chappel*, 124 Michigan, 72; *Chicago &c. Ry.* v. *Hough*, 61 Michigan, 507; *Cary* v. *Curtis*, 3 How. 239; *Chicago &c. Ry.* v. *Minnesota*, 134 U. S. 418; *De Lima* v. *Bidwell*, 182 U. S. 1; *Detroit & Mac. Ry.* v. *Mich. R. R. Com.*, 171 Michigan, 335; *Ekiu* v. *United States*, 142 U. S. 651; *Elliott* v. *Swartwout*, 10 Pet. 137; *Falsburg Power Co.* v. *Alexander*, 101 Virginia, 95; *Foule* v. *Mann*, 53 Iowa, 42; *Ford* v. *Chicago &c. Ry.*, 14 Wisconsin, 609; *Hovey* v. *Elliott*, 167 U. S. 409; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *Louis. & Nash. R. R.* v. *Garrett*, 231 U. S. 298; *Mann* v. *Pere Marquette Ry.*, 135 Michigan, 210; *Mo. Pac. Ry.* v. *Nebraska*, 217 U. S. 196; *Oregon Ry. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *People* v. *Lake Shore Ry.*, 52 Michigan, 227; *People* v. *Smith*, 21 N. Y. 595; *People* v. *D. G. H. & M. Ry.*, 79 Michigan, 417; *Pere Marquette Ry.* v. *Gypsum Co.*, 154 Michigan, 290; *Pipe Line Cases*, 234 U. S. 518; *Pumpelly* v. *Canal Co.*, 13 Wall. 168; *Roller* v. *Holly*, 176 U. S. 398; *Union Lime Co.* v.

Chicago &c. Ry., 233 U. S. 211; *Sholl* v. *German Coal Co.*, 118 Illinois, 427; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Wadley South. Ry.* v. *Georgia*, 235 U. S. 651; *Water Works Co.* v. *Burkhart*, 41 Indiana, 364.

Mr. D. H. Crowley, with whom *Mr. Grant Fellows* and *Mr. I. S. Canfield* were on the brief, for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This was a petition to the Supreme Court of Michigan by the Railroad Commission of that State for a writ of mandamus to enforce obedience to an order of the commission directing the Detroit & Mackinac Railway Company to relay one-half mile of rails removed by it from a five-mile logging spur, called Tubbs Branch, and to resume service thereon. The railroad company answered, and, after a hearing, the court granted the writ subject to a condition presently to be stated. 178 Michigan, 230.

The commission's action was invoked by a complaint presented by the Fletcher Paper Company, of which the railway company had due notice. Before the commission the railway company insisted that the logging spur was not a part of its railroad system and that its use had been only that of a private convenience; but the commission concluded from the pleadings and evidence that the fact was otherwise and made the order with the purpose of correcting what it deemed an unreasonable and unjust discrimination and an inadequate service within the meaning of the local statute, 3 Howell's Ann. Stat., 2nd ed., §§ 6526, 6537, 6545. Thereupon the railway company filed a bill in equity in the Circuit Court of Wayne County praying that the order be vacated and asking that its enforcement be temporarily and permanently enjoined. In the bill the railway company repeated its insistence

that the logging spur was not a part of its railroad system but only a private convenience, and charged that an adequate hearing was denied by the commission in that the issues were determined upon the evidence presented by the paper company and in contravention of an understanding, assented to by the commission, that if an objection of the railway company in the nature of a plea of *res judicata* should be overruled, as it afterwards was, the company would be afforded a further opportunity to present evidence in opposition to that of the paper company. The bill invoked the due process of law clause of the Fourteenth Amendment. Apparently the prayer for a temporary injunction was not insisted upon.

It was during the pendency of that suit that the mandamus proceeding was begun and carried to judgment in the Supreme Court. In this proceeding the railway company again asserted that the logging spur was only a private convenience and not a part of the railroad system used by it as a common carrier and that the commission had denied it an adequate opportunity to be heard upon that question, and further insisted that to require it to give effect to the commission's order in advance of a hearing and decision upon that question in the suit in equity would deprive it of the due process of law guaranteed by the Fourteenth Amendment.

In the course of its opinion the Supreme Court said, pp. 243–246:

"We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent railway company upon the order of August 3, 1911. Such questions are involved in the case now pending before the circuit court for the County of Wayne in chancery, wherein the respondent railway company seeks to review, annul and set aside said order. The sole question before this court in this proceeding is whether the order of the railroad commission shall

take effect and become operative pending the hearing and determination of that chancery cause. . . .

"Relative to an order made by this commission this court has said: ' . . . Its orders stand until modified or set aside by it or by the courts. . . . Presumptively, the findings and orders of the commission are right. If attacked, the complainant has the burden of showing by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be.' *Detroit &c. R. R.* v. *Railroad Commission*, 171 Michigan, 335, 346.

* * * * * * * *

"The petitioner in the instant case before the railroad commission offered, and upon this hearing before this court keeps such offer good, to indemnify respondent for all costs and expenses incurred in re-laying the track taken up by it, with interest, and to pay all rates that may be fixed or charged by the railway company and approved by the commission, in case this order is vacated and set aside by the Wayne circuit court in chancery, or by this court, if an appeal is taken. This indemnity would save respondent harmless from any possible loss in complying with the order, and save petitioner from claimed irreparable damage to 21,000,000 feet of forest products during the probable term of years occupied in this litigation.

"It was held by this court that an order of the railroad commission is enforceable by mandamus, although a proceeding in equity to review it is pending. *Michigan R. R. Comm.* v. *Railroad Co.*, 159 Michigan, 580.

"This order is *prima facie* not unreasonable. There is no question but that the legislative intent clearly expressed in this statute was that the orders of the commission should be and continue in force during all subsequent proceedings until modified or set aside by the commission or by the courts.

"The statute provides a remedy by mandamus to en-

force the orders of the commission, and this court has granted such writs. Upon the facts presented, the writ should be granted in this case.

"Upon furnishing bond by the petitioner before the railroad commission, the Fletcher Paper Company, in the penal sum of $10,000 to indemnify respondent in manner and form as herein stated, with two sureties to be agreed upon between the parties, or approved by the clerk of this court, a writ of mandamus will issue as prayed."

And in the course of a separate opinion one of the Justices said, p. 248:

"So long as the respondent was operating the spur, accepting thereon and transporting over it freight for those who offered it, and so long as it published tariffs affecting such service, it was undoubtedly, as to such operations, within the scope of the act in question, and this we held in *Detroit &c. R. R.* v. *Railroad Commission*, 171 Michigan, 335. But whether the Michigan railroad commission has power under the statute to require respondent to continue to operate such a spur, or branch, against its will, and in face of its efforts to abandon it, is quite a different question. It is a question which we assume is presented in the pending chancery proceeding to set aside the order which in this proceeding is sought to be enforced. It need not be answered now."

The local statute, 3 Howell's Ann. Stat., 2nd ed., provides: (§ 6545) Orders of the commission shall take effect and become operative twenty days after service; (§ 6547) the commission may upon application rescind or alter any order; (§ 6548) all regulations, practices and services prescribed by the commission shall be in force and be *prima facie* lawful and reasonable until finally held otherwise in a suit brought for the purpose under § 6549, or until rescinded or altered by the commission under § 6547; (§ 6549) a carrier may, within thirty days after notice of an order, commence a suit in equity to vacate

it, the burden being upon the carrier to show that the order is unlawful or unreasonable. In such a suit original evidence may be introduced in addition to the transcript of that presented before the commission; and if evidence be introduced by the carrier which is different from or in addition to that presented before the commission the court, unless the parties stipulate to the contrary, shall transmit a copy thereof to the commission and stay further proceedings for the time being. The commission shall consider the evidence transmitted and may alter or rescind its order and shall report its action to the court. If the commission rescind its order the suit shall be dismissed; if it alter the order, the same in its changed form shall take the place of the original and judgment shall be rendered thereon as though the last action of the commission had been taken at first; (§ 6570) in addition to all other remedies, the commission, and likewise any party in interest, may compel compliance with an order of the commission by a proceeding in mandamus, injunction or other appropriate civil remedy.

It will be perceived that the Supreme Court, applying the statute, held that the "sole question" for decision was whether the commission's order should be given effect pending the determination of the equity suit, and then, coming to dispose of that question, held that due regard for the provisions of the statute, especially §§ 6545, 6548 and 6549, and for the relative consequences of enforcing or refusing to enforce the order required that it be enforced by mandamus, if a suitable bond was given to indemnify the railway company for any resulting loss in the event the order ultimately should be vacated in the equity suit.

Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of § 237, Jud. Code, upon which our power to review depends, because the judgment does not determine the merits and end the

litigation. But, as this court has said, "all judgments and decrees which determine the particular cause" are final in the sense of the statute. *Weston* v. *Charleston*, 2 Pet. 449, 463–465; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24, 40; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute. *Davies* v. *Corbin*, 112 U. S. 36, 40; *McPherson* v. *Blacker*, 146 U. S. 1, 24; *American Express Co.* v. *Michigan*, 177 U. S. 404, 406.

Under the local statutes, as interpreted by the Supreme Court of the State, whether the logging spur was merely a private convenience or was so used and operated by the railway company that the latter was not free to discontinue service thereon, in the circumstances existing when the rails were removed, was primarily a question for the commission and secondarily for the Wayne Circuit Court wherein the commission's order was sought to be vacated. By the order the commission resolved this question against the railway company. The order was valid upon its face and recited that it was made after a hearing and due consideration of the proofs and briefs of the parties. Whether the hearing was adequate and whether the facts relating to the logging spur were such as to sustain the order were matters which were in issue in the suit in the Wayne Circuit Court, where the railway company was at liberty to produce any evidence legitimately bearing upon the propriety of the order. It was in this situation that the Supreme Court, having regard to the statutory requirement that the order be given effect and treated as *prima facie* lawful and reasonable until adjudged otherwise in

the suit brought to vacate it, and also having regard to the comparative consequences of enforcing or refusing to enforce it while that suit was undetermined, held that it ought to be enforced by mandamus, if a suitable bond was given to indemnify the railway company should the order ultimately be vacated. In this we perceive no deprivation of due process. The granting of an order or writ to maintain or restore the *status quo* pending the outcome of existing litigation, which really is what was done here, has been practiced by the courts of the country since before the Constitution was adopted, and the claim that relief of this nature cannot be granted, even upon condition that ample security be given to make good any loss that may be sustained thereby, without encroaching upon the due process of law secured by the Constitution is manifestly without merit.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment is not final within the meaning of § 237, Jud. Code, and therefore that the writ of error should be dismissed.

WILLINK, EXECUTRIX, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 180. Argued January 21, 1916.—Decided April 3, 1916.

The mere location by the Secretary of War of a harbor line does not amount to a taking of property within the line or its appropriation to public use; nor does a taking result from the request of an officer of the United States to a riparian owner to vacate if such request is neither acceded to nor enforced.

The fact that the Government makes a contract to cut away land

within a harbor line location does not amount to a taking of such land if there was no attempt to perform the contract.

Whatever rights a riparian owner may have in land below mean high-water line of a navigable and tidal river, they are subordinate to the public right of navigation and the power of Congress to employ all appropriate means to keep the river open and navigation unobstructed.

Congress may prevent renewal of existing obstructions below mean high water, if navigation may be injuriously affected thereby, and the owner is not entitled to compensation therefor.

In this case, a riparian owner on the Savannah River was held not to be entitled to recover as upon an implied contract for taking his property by reason of damages alleged to have been sustained by him in consequence of the exercise of the power of Congress over navigable waters.

38 Ct. Cl. 693; 49 Ct. Cl. 701, affirmed.

THE facts, which involve the right of the owner of a wharf in the harbor of the Savannah River to recover from the Government as upon an implied contract for the taking of his property in the improvement of that harbor, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant:

Appellant's right of recovery is based on the following grounds:

The Government had the right to take this property for the public use of harbor improvement.

This right was exercised by the following acts of governmental authorities:

The submission to Congress by the officers of the Engineer Corps of the United States Army of a plan which contemplated the taking of this very property and the payment of damages for the same.

The approval of the plan by Congress through the making of appropriations for the same.

The action of the Secretary of War in the establishment of a harbor line which took in this very property.

The entering into a contract by an engineer officer of the Army, approved by the Chief of Engineers, for cutting off the land outside of the harbor line thus fixed.

The action of the engineer officer in charge of improvements in ordering Willink to desist from renewing his piling and in ordering him to remove everything belonging to him outside of the harbor line.

The action of the United States District Attorney in threatening appellant with prosecution under the criminal provisions of the River and Harbor Act, unless he desisted from further obstruction, and removed such piling as Captain Carter desired removed, *i. e.*, all piling outside the bulkhead line.

Appellant acquiesced in the taking of his property by such ample authority, both legislative and executive; acted the part of a good citizen in refraining from further acts of ownership thereof or interfering with the projects of improvements; and thus reserved his right to recover compensation.

The opinion of the court below in its first paragraph expresses regret at its inability to reach a conclusion favorable to the claimant. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Great Falls Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333, 338; *United States* v. *Guzzard*, 219 U. S. 180; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546.

Greenleaf v. *Garrison*, 237 U. S. 251, distinguished, as the invasion of the property in this case was of the land,—not merely of the possessory right of a riparian owner in the bed of adjacent navigable water.

The right of appellant to compensation does not rest entirely upon the Fifth Amendment or other general provision of law. It is also based upon the fact that the approved project under which the land and wharves were taken contemplated that they should be paid for, and the

estimate of appropriation included $45,000 for "the damages to private property" and "replacing wharves" and Congress appropriated the sum so asked. Hence, the claim rests also upon the direct provisions of an act of Congress.

There is no foundation for the view that the acts of the officers of the United States stopped short of a taking of the claimant's property. Everything was done under full sanction of the Secretary of War. He in turn acted under the authority of an act of Congress. Claimant was not obliged to submit to the indignity of arrest and prosecution, in order to test his rights. On the contrary, he acted as a good citizen, in conforming to the desires of the officers of the Government, who were carrying out the directions of the Secretary of War, and in suffering the damage inflicted upon him, relying upon the courts for redress in awarding him the "just compensation" assured by the Constitution for the taking of his property. *Pearsall* v. *Supervisors*, 74 Michigan, 558; *Janesville* v. *Carpenter*, 77 Wisconsin, 288, 301; *Forster* v. *Scott*, 136 N. Y. 577; *St. Louis* v. *Hill*, 116 Missouri, 527, 534; Lewis on Eminent Domain, §§ 95–101.

Mr. Assistant Attorney General Huston Thompson for the United States:

Congress acted within its constitutional powers in authorizing the Secretary of War to establish the harbor lines in the Savannah River. *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 258; § 12, Act of August 11, 1888, 25 Stat. c. 860, 400, 425.

In establishing the harbor line the Secretary of War was simply attempting to carry out previous plans within the power delegated to him by Congress. *Union Bridge Company* v. *United States*, 204 U. S. 364. As the agent of Congress the Secretary's acts in the premises cannot be questioned. *Scranton* v. *Wheeler*, 179 U. S. 141, 162; *United States* v. *Chandler Dunbar Co.*, 229 U. S. 64.

The establishment of the line of 1889 did not exhaust the Secretary's power, but there remained to him authority to change the line when and as often as the demands of navigation in his judgment made it necessary. *Union Bridge Co.* v. *United States, supra; Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 194; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 638.

The premises directly affected were within high water and harbor lines of a navigable stream, and therefore the Fifth Amendment cannot be invoked.

The Fifth Amendment cannot be invoked where the right of appellant to the use of the river bed was subject to a superior right of the Government, which had been exercised.

Under the dominant right of the Government to improve navigation its engineers could require the removal of anything in the bed of the stream which obstructed navigation. Cases *supra.*

Hence, when appellant constructed the wharf and marine railway within the confines of the stream he did so subject to subsequent action of Congress.

The damages complained of were not the result of direct invasion by the Government, but the incidental consequence of a lawful exercise of governmental power.

The harbor line of March 4, 1889, was only on paper. *Prosser* v. *Nor. Pac. R. R.*, 152 U. S. 59.

Appellant was never ousted from his premises. Whatever damage resulted to him, such as cost of dredging along his marine railroad and a loss of business consequent to the diminished depth of water and his inability to dock large vessels, occurred from the fact that the improvements affected were within the confines of a navigable stream. *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Bedford*, 192 U. S. 217.

Appellant's contention being predicated upon tortious acts of government officials, the Court of Claims was with-

out jurisdiction. *Langford* v. *United States*, 101 U. S. 341–346; *Bigby* v. *United States*, 188 U. S. 400, 410; *Hill* v. *United States*, 149 U. S. 593, 599.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Henry F. Willink sued to recover as upon an implied contract for an alleged taking of his property in the improvement of the harbor in the Savannah River at Savannah, Georgia. A recovery was denied, 38 Ct. Cls. 693; 49 Ct. Cls. 701, and the claimant's executrix prosecutes this appeal.

The material facts disclosed by the findings are these: At Savannah the river is navigable and within the ebb and flow of the tide. Opposite the city is Hutchinson's Island, a strip of which on the side towards the city was owned by the claimant. He there conducted a plant for repairing vessels. Among his facilities used in the business were a marine railway and a wharf. The former extended into the river and was protected by sheet piling "where in the water." A substantial portion of it lay below the mean high-water line, and the wharf seems also to have been below that line, although its location is not precisely stated. In the conduct of the claimant's business the vessels subjected to repair were drawn out of the river and lowered into it by means of the railway, and to prevent its lower end, "which was under water at high tide," from becoming seriously obstructed by deposits of mud the piling was driven on both sides. The piling was effectual for the purpose, but decayed in time and had to be replaced.

Prior to 1887 many improvements had been made in the harbor, and in that year a plan for further and extensive improvements was submitted to Congress, but was not approved. Among other changes this plan contem-

plated a widening of the river by cutting away a portion of Hutchinson's Island including that whereon the claimant's facilities were situate. On May 4, 1889, the harbor line, which theretofore had not reached the island or the claimant's facilities, was reëstablished by the Secretary of War, under § 12 of the act of August 11, 1888, c. 860, 25 Stat. 400, 425, in such manner that a part of the claimant's land and all of his facilities were brought within the harbor area. In 1890 another extended project, retaining the earlier proposal to widen the river by cutting away a portion of the island, was submitted to Congress and was approved. The estimated cost of this project was $3,500,000, which included $45,000 for "possible land damages" to the island. A part of the larger sum was appropriated each year until the appropriations equalled the full estimate, which was in 1895. The appropriation of July 13, 1892, c. 158, 27 Stat. 88, 92, was accompanied by a provision that "contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate" so much of the estimate as remained unappropriated. A contract was then made for cutting away a portion of the island including that whereon the claimant's facilities were situate, but this work never was done or undertaken, and the appropriations were otherwise exhausted and the project treated as completed.

In the summer of 1892 the condition of the claimant's wharf and piling became such that it was necessary to rebuild the one and to renew the other. While he was so engaged the engineer officer in charge of the harbor improvements requested him to desist and to remove all of his facilities that were within the harbor area as defined by the Secretary of War in 1889. The request was followed by a letter from the United States Attorney for

that district notifying the claimant that in driving the piling he was obstructing navigation contrary to the act of September 19, 1890, c. 907, 26 Stat. 426, 454–455, and that unless he desisted and "all piling outside of the bulkhead line" was removed he would be prosecuted. Because of this request and notice he ceased work upon the piling and wharf, but did not remove any of his facilities or surrender them or his land to the United States or any of its officers. On the contrary, he continued to operate his plant and use his marine railway and other facilities as best he could. Theretofore he was able to haul up on the railway and repair vessels of considerable draft, and the chief profit in his business came from that work; but thereafter, the renewal of the piling being prevented, deposits of mud filled up the entrance to the railway to such an extent that he was obliged to confine his work to smaller vessels. Even then it was necessary to be almost constantly dredging the entrance. This condition continued until December, 1897, when the Secretary of War reëstablished the harbor line as it was prior to May 4, 1889. The expense incurred by the claimant in dredging was $7,697 and the loss consequent upon his inability to handle the larger vessels was $12,500.

Upon these facts, as before indicated, the court held that he was not entitled to recover.

We reach the same conclusion, and for the following reasons:

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use. *Yesler* v. *Washington Harbor Line Commissioners*, 146 U. S. 646, 656; *Prosser* v. *Nor. Pac. R. R.*, 152 U. S. 59, 65; *Philadelphia Co.* v. *Stimson*, 223 U. S.

605, 623. No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance. Thus, at best, the asserted taking rested upon the acts of the engineer officer and the district attorney in preventing the claimant from renewing his piling and rebuilding his wharf. But in this no right of his was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed. *Gibson* v. *United States*, 166 U. S. 269, 271; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634, 638; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 88; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 263. The piling and wharf were below the mean high-water line, and so, if navigation was likely to be injuriously affected by their presence, Congress could prevent their renewal without entitling him to compensation therefor. See cases *supra*. By the legislation in force at the time, Congress not only authorized the Secretary of War to establish the harbor lines, but made it unlawful to extend any wharf or other works, or to make any deposits, within the harbor area as so defined, except under such regulations as the Secretary might prescribe, and laid upon the district attorney and the officer in charge of the harbor improvements the duty of giving attention to the enforcement of its prohibitive and punitive provisions, Aug. 11, 1888, c. 860, § 12, 25 Stat. 400, 425; Sept. 19, 1890, c. 907, §§ 11–12, 26 Stat. 426, 455. When the claimant attempted to renew the piling and rebuild the wharf they were not only below the mean high-water line but

within the harbor area as defined under this legislation. Consistently with its prohibitions he could not proceed with the work, except under a permissible regulation of the Secretary of War. It is not contended that the work was thus made permissible, and so the conclusion is unavoidable that the claimant was proceeding in violation of the statute and that the engineer officer and the district attorney rightly requested him to desist. Such inconvenience and damage as he sustained resulted not from a taking of his property, but from the lawful exercise of a power to which it had always been subject. *Gibson* v. *United States, supra*, 276; *Bedford* v. *United States*, 192 U. S. 217, 224.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.

CENTRAL TRUST COMPANY OF ILLINOIS, TRUSTEE OF FRANK E. SCOTT TRANSFER COMPANY, BANKRUPT, *v.* CHICAGO AUDITORIUM ASSOCIATION.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHICAGO AUDITORIUM ASSOCIATION *v.* CENTRAL TRUST COMPANY, TRUSTEE, &c.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 162, 174. Argued January 12, 1916.—Decided April 3, 1916.

Appeals from decisions of the Circuit Court of Appeals, allowing or rejecting a claim in bankruptcy, are, in the absence of the certificate prescribed by § 25b–2, limited under § 25b–1 to cases involving Federal questions of the kind described in § 237, Jud. Code.

Whether damages for anticipatory breach of an executory contract which one of the parties can cancel on notice after a stated period can be recovered for the life of the contract or only up to the end of such period after the breach involves no Federal question.

Where the question on which a cross appeal is based is of general importance in relation to questions involved on the direct appeal, the court may, and in this case does, allow a certiorari in lieu of the cross appeal which must be dismissed.

The general rule, the exceptions to which are not material in this case, is that where a party, bound by an executory contract, repudiates his obligations or disables himself from performance, the promisee has the option to treat the contract as ended and may maintain an action at once for damages occasioned by the anticipatory breach.

The intervention of bankruptcy, *held*, under the circumstances of this case, to constitute such a breach, notwithstanding the petition was involuntary; and also *held* that the claim of the promisee is one founded upon a contract expressed or implied and provable under § 63a–4, and that the damages may be liquidated under § 63b.

In this case, *held* that the claim may be proved for damages occasioned by the breach covering the entire life of the contract, notwithstanding the party proving the claim had the right to cancel on a stated notice, that provision not being reciprocal.

216 Fed. Rep. 308, affirmed as to allowance of claim; cross appeal therefrom dismissed; certiorari allowed and reversed as to amount of claim allowed.

THE facts, which involve the effect of bankruptcy of one party to an executory contract and the right of the other party to regard the same as an anticipatory breach of the contract and to prove its claim against the bankrupt's estate, are stated in the opinion.

Mr. Edwin C. Brandenburg, with whom *Mr. Frederick D. Silber* and *Mr. Clarence J. Silber* were on the brief, for Central Trust Company, Trustee:

Subdivisions 1 and 4 of § 63a, of the Bankruptcy Act, must be construed together, and the words, "absolutely owing at the time of the filing of the petition, etc.," appearing in subd. 1, are to be read into and construed as a part of subd. 4. *Zavelo* v. *Reeves*, 227 U. S. 625; *Re*

Roth, 181 Fed. Rep. 667; *Colman Co.* v. *Withoft*, 195 Fed. Rep. 250.

Anticipatory breach of an executory contract, results from a positive, unconditional and unequivocal declaration by a party thereto, or fixed purpose not to perform the contract, in any event or at any time. *Dingley* v. *Oler*, 117 U. S. 490; *Roehm* v. *Horst*, 178 U. S. 1; *Lake Shore &c. Ry.* v. *Richards*, 152 Illinois, 59; *Zuck* v. *McClure*, 98 Pa. St. 541; *Johnstone* v. *Milling*, L. R. 16 Q. B. Div. 460; *Dalrymple* v. *Scott*, 19 Ont. App. Rep. 477; *People* v. *Globe Ins. Co.*, 91 N. Y. 174; distinguishing: *Lovell* v. *St. Louis Ins. Co.*, 111 U. S. 264; *Carr* v. *Hamilton*, 129 U. S. 252; *Penna. Steel Co.* v. *N. Y. City Ry.*, 198 Fed. Rep. 721, 735.

Neither insolvency nor the filing of an involuntary petition in bankruptcy, followed by adjudication, constitutes a breach of an executory contract, to which the insolvent or bankrupt is a party, and from which a provable debt accrues. *Phenix Bank* v. *Waterbury*, 197 N. Y. 161; *Re Agra Bank*, L. R. 5 Eq. Cas. 160; *Malcomson* v. *Wappoo Mills*, 88 Fed. Rep. 680; *Re Inman & Co.*, 171 Fed. Rep. 185; *S. C.*, 175 Fed. Rep. 312; *Lesser* v. *Gray*, 8 Ga. App. 605; aff'd in 236 U. S. 70; *Re Imperial Brewing Co.*, 143 Fed. Rep. 579; *Matter of Montague*, 32 Am. B. R. 106; distinguishing *Re Swift*, 112 Fed. Rep. 315; *Re Pettingill*, 137 Fed. Rep. 143; *Re Neff*, 157 Fed. Rep. 57.

Resulting claim for damages, if bankruptcy is in fact a breach, constitutes nothing more than a contingent claim, which is non-provable under the present Bankruptcy Act, § 63a. 1 Remington on Bank. (2d ed., § 641); *Dunbar* v. *Dunbar*, U. S. 340; *Cotting* v. *Hooper*, 34 Am. B. R. 23; *Re Levy*, 208 Fed. Rep. 479; *Re American Vacuum Cleaner Co.*, 192 Fed. Rep. 939; *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549.

For the same reason, as applied to leasehold contracts,

subsequent installments of rent or damages for alleged breach through bankruptcy, of one of the parties, are not provable in bankruptcy. *Watson* v. *Merrill*, 136 Fed. Rep. 359; *Colman* v. *Withoft*, 195 Fed. Rep. 250; *Re Roth*, 181 Fed. Rep. 667; *Slocum* v. *Soliday*, 183 Fed. Rep. 410.

The contract involved passed, by operation of law, and as part of the bankrupt's estate, to the appellant as its trustee. *Gazlay* v. *Williams*, 210 U. S. 41.

As such, the appellant had a reasonable length of time after its election and qualification as trustee, to either assume or renounce performance of the contract. *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sessions* v. *Romadka*, 145 U. S. 29; *Atch., Top. &c. Ry.* v. *Hurley*, 153 Fed. Rep. 503.

Mr. William D. Bangs, with whom *Mr. Rudolph Matz* and *Mr. John C. Mechem* were on the brief, for Chicago Auditorium Association:

Bankruptcy constitutes a material breach of executory contracts. Disablement from performance is a breach of contract. *Roehm* v. *Horst*, 178 U. S. 1.

Insolvency is often a disablement. *Chemical Bank* v. *World's Columbian Exp.*, 170 Illinois, 82; *Bank of Commissioners* v. *New Hampshire Trust Co.*, 69 N. H. 621.

Similarly, so is the appointment of a receiver. *Pennsylvania Steel Co.* v. *New York City Ry.*, 198 Fed. Rep. 721.

Or proceedings for liquidation under special statutes. *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264; *Carr* v. *Hamilton*, 129 U. S. 252.

Bankruptcy is a complete disablement. *Re Swift*, 112 Fed. Rep. 315; *Re Pettingill*, 137 Fed. Rep. 143; *Re Neff*, 157 Fed. Rep. 57; *Re Duquesne Light Co.*, 176 Fed. Rep. 785; *Re Dr. Vorhees Co.*, 187 Fed. Rep. 611.

A claim for damages for a material breach of an executory contract caused by bankruptcy constitutes a provable debt. Cases *supra*, and see also *Zavelo* v. *Reeves*, 227 U. S. 625; *Ex parte Pollard*, 2 Lowell, 411; *Lesser* v.

Gray, 236 U. S. 70; *Grant Shoe Co.* v. *Laird*, 212 U. S. 445.

The present case does not involve an anticipatory breach of contract. Williston, Wald's Pollock on Contracts, pp. 362, 363; *Lowe* v. *Harwood*, 139 Massachusetts, 135.

The claim is provable, although the damages are unliquidated and the trustee has an option to continue the performance of executory contracts. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445; *Re Swift et al.*, 112 Fed. Rep. 315; *Dunbar* v. *Dunbar*, 190 U. S. 340; *Cobb* v. *Overman*, 109 Fed. Rep. 65.

The rule as to the material breach of a covenant to pay rent does not apply to the material breach of executory contracts. Co. Litt. 292b, §§ 512–513; *Re Roth and Appel*, 181 Fed. Rep. 667; *Watson* v. *Merrill*, 136 Fed. Rep. 359; *Slocum* v. *Soliday*, 183 Fed. Rep. 410.

An option in one party of cancellation upon stipulated contingencies does not, after material breach by the other party, affect the recovery of damages for breach of contract by that party for whose benefit the option was inserted. *Dunbar* v. *Dunbar*, 190 U. S. 340.

The general policy of the Bankruptcy Act favors the provability of claims for damages upon executory contracts matured by bankruptcy. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549.

Mr. Justice Pitney delivered the opinion of the court.

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held contract relations with the Chicago Auditorium Association under a written agreement made between them February 1, 1911, which had been partially

performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the City of Chicago, that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of $6,000, in monthly instalments of $100 each, and for the livery privilege the sum of $15,000 in monthly instalments of $250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at reasonable rates at all times during the continuance of the privileges. It was further agreed as follows:

"The party of the first part [Chicago Auditorium Association], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so cancelled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part [Scott Transfer Company] from liability on the covenants and agreements of this instrument."

The contract authorized the Association, in the event of default by the Transfer Company in the payment of any instalment of money due, or in the performance of any other covenant, if continued for thirty days, to terminate the privileges at its option, without releasing the Transfer Company from liability upon its covenants. Should either or both of the privileges be thus terminated before January 31, 1916, the Association was to be at liberty to sell the privileges, or make a new or different contract for the remainder of the term, but was not to be obliged to do this, and the Transfer Company, unless released in writing, was to remain liable for the entire amount agreed to be paid by it.

Up to the time of the bankruptcy this contract remained in force, and neither party had violated any of its covenants. The trustee in bankruptcy did not elect to assume its performance, and the Association entered into a contract with other parties for the performance of the baggage and livery service, and obtained therefrom the sum of $234.69 monthly as compensation for those privileges. On February 28, 1912, it exhibited its proof against the bankrupt estate, claiming an indebtedness of $6,537.94, of which $311.20 had accrued prior to the bankruptcy proceedings, and the remainder was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through the bankruptcy proceedings. Of this amount $691.86 represented the loss incurred during the first six months of bankruptcy. Objections filed by the trustee were sustained by the referee, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings. On review, the District Court sustained this decision. On appeal to the Circuit Court of Appeals, the order of the District Court was reversed, and the cause remanded with direction to allow $691.86 upon the claim, and to disallow the remaining portion. 216 Fed. Rep. 308.

An appeal to this court by the trustee in bankruptcy was allowed, under § 25b-2 of the Bankruptcy Act (of July 1, 1898, c. 541; 30 Stat. 544, 553), upon a certificate by a Justice of this court that the determination of the questions involved was essential to a uniform construction of the Act throughout the United States. This is No. 162. Thereafter a cross-appeal by the Auditorium Association was allowed by one of the judges of the Circuit Court of Appeals. This is No. 174.

A motion is made to dismiss the cross-appeal, and this must be granted. In the absence of the certificate prescribed by § 25b-2, the sole authority for an appeal from a decision of the Circuit Court of Appeals allowing or rejecting a claim is found in § 25b-1: "Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States." This limits such appeals to cases where Federal questions are involved, of the kind described in § 237, Jud. Code. The motion to dismiss is resisted upon the ground that the claim of the Association to damages beyond a period of six months was denied by the Court of Appeals as not constituting a provable debt in bankruptcy, and that a Federal question is thus necessarily presented, provability depending upon a construction of the Bankruptcy Act. An examination of the opinion of that court, however, shows that while it held that damages for anticipatory breach of the contract were provable, it held that the contract itself, because of the option reserved to the Auditorium Association to cancel it on six months' notice, was mutually obligatory for that term only, and hence no damages beyond that period were allowable. This involved no Federal question. *Chapman* v. *Bowen*, 207 U. S. 89, 92.

But, in view of the general importance of the question of the amount allowable in its relation to the questions

involved in the trustee's appeal, we have concluded that a certiorari should be allowed in lieu of the cross-appeal.

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. *Roehm* v. *Horst*, 178 U. S. 1, 18, 19. And see *O'Neill* v. *Supreme Council*, 70 N. J. L. 410, 412. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. It was, however, held in *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264, 274, where a life insurance company became insolvent and transferred its assets to another company, that a policy-holder was entitled to regard his contract as terminated and demand whatever damages he had sustained thereby. And see *Carr* v. *Hamilton*, 129 U. S. 252, 256. In support of the provability of the claim in controversy, *Ex parte Pollard*, 2 Low. 411; Fed. Cas. No. 11,252; *In re Swift* (C. C. A. 1st), 112 Fed. Rep. 315, 319, 321; *In re Stern* (C. C. A. 2d), 116 Fed. Rep. 604; *In re Pettingill & Co.* (D. C., Mass.), 137 Fed. Rep. 143, 146, 147; *In re Neff* (C. C. A. 6th), 157 Fed. Rep. 57, 61, are referred to; and see *Pennsylvania Steel Co.* v. *New York City Ry. Co.* (C. C. A. 2d), 198 Fed. Rep. 721, 736, 744. To the contrary, *In re Imperial Brewing Co.* (D. C., Mo.), 143 Fed. Rep. 579; *In re Inman & Co.* (D. C., Ga.), 171 Fed. Rep. 185;

S. C., 175 Fed. Rep. 312; besides which a number of cases arising out of the relation of landlord and tenant are cited: *In re Ells*, 98 Fed. Rep. 967; *In re Pennewell*, 119 Fed. Rep. 139; *Watson* v. *Merrill*, 136 Fed. Rep. 359; *In re Roth & Appel*, 181 Fed. Rep. 667; *Colman Co.* v. *Withoft*, 195 Fed. Rep. 250. Cases of the latter class are distinguishable, because of the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt., 292, b, § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. 565), to the extent that it had an option to perform it in the place of the bankrupt (see *Sparhawk* v. *Yerkes*, 142 U. S. 1, 13; *Sunflower Oil Company* v. *Wilson*, 142 U. S. 313, 322); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and

dissolving the corporation, in *People* v. *Globe Ins. Co.*, 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the State, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in *Roehm* v. *Horst*, 178 U. S. 1, 19: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to per-

form. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst*, *supra*.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a-4, and the damages may be liquidated under § 63b. *Grant Shoe Co.* v. *Laird*, 212 U. S. 445, 448. It is true that in *Zavelo* v. *Reeves*, 227 U. S. 625, 631, we held that the debts provable under § 63a-4 include only such as existed at the time of the filing of the petition. But we agree with what was said in *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. And as was also declared in *In re Pettingill*, 137 Fed. Rep. 143, 147: "The test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. 562)." It was in effect so ruled by this court in *Lesser* v. *Gray*, 236 U. S. 70, 75, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable for any resulting damage; but he was released therefrom by his

discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the Circuit Court of Appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim.

The denial of all damages except such as accrued within six months after the filing of the petition was based upon the ground that the contract reserved to the Association an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months. It was held that because of this the contract was mutually obligatory for that term only, and uncertain and without force for any longer term of service *in futuro*, within the ruling of this court in *Dunbar* v. *Dunbar*, 190 U. S. 340. In that case the contract was to pay to a divorced wife "during her life, or until she marries, for her maintenance and support, yearly, the sum of five hundred dollars"; and it was held that for instalments falling due after bankruptcy the husband remained liable, notwithstanding his discharge, on the ground that the wife's claim for such payments was not provable because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. The court referred to the 1903 amendment of § 17 of the Bankruptcy Act (32 Stat. 797) relating to debts not affected by a discharge, and including among these a liability for alimony due or to become due for maintenance or support of wife or child. This, while enacted after the Dunbar suit was begun, and not applicable to it, was cited as showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support of his wife or children. The authority of that decision cannot be extended to cover

such a case as the present. Here the obligation of the bankrupt was clear and unconditional. The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges. It does not lie in the mouth of the latter, or of its trustee, to say that its service would not be satisfactory, and there is no presumption that otherwise it would have been advantageous to the Association to exercise the option. It results that the decree, in so far as it limits the provable claim to a period of six months after the bankruptcy, must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

No. 162. Decree affirmed. No. 174. Appeal dismissed, certiorari allowed, and decree reversed.

PINEL *v.* PINEL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 181. Argued January 17, 1916.—Decided April 3, 1916.

When two or more plaintiffs having separate and distinct demands unite in a single suit, the demand of each must be of the requisite amount to be within the jurisdiction of the District Court; when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest that court has jurisdiction if they collectively equal the jurisdictional amount.

Under par. 1, § 24, Jud. Code, where jurisdiction is based on diverse citizenship, the matter in controversy must appear by distinct averment on face of the bill, or otherwise from proof, to exceed $3,000.

In a suit by two children of a testator, each alleging a statutory intestacy as to himself on the ground that he was omitted from the will through testator's mistake, and one of them claiming by purchase from another child as to whom a like mistake and statutory

intestacy is alleged, one plaintiff seeking to recover two undivided shares of one-eighth, and the other one undivided share of one-eighth, in an estate, the maximum value of which is less than twelve thousand dollars, *held* that as it does not satisfactorily appear that the value of the interest of either complainant exceeds three thousand dollars, jurisdiction does not exist.

In such a suit, the interests of the complainants are separate and distinct; they cannot be aggregated in determining whether the amount in controversy is sufficient to give jurisdiction.

THE facts, which involve the determination of the amount in controversy and whether it is sufficient to give the District Court jurisdiction, are stated in the opinion.

Mr. Emil W. Snyder, with whom *Mr. Frank E. Robson* was on the brief, for appellants.

Mr. Lynn M. Johnston, with whom *Mr. L. C. Stanley* was on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a direct appeal under § 238, Jud. Code, from an order dismissing a bill of complaint for want of jurisdiction. There are two complainants, and the jurisdictional questions certified are, (1) whether the amount in controversy is sufficient to give the court jurisdiction, and (2) whether the parties are collusively joined.

It is averred in the bill that complainants and defendants are the children of one Charles T. Pinel, a resident of the State of Michigan, who died June 26, 1888, possessed in fee simple of a tract of land situate in that State, and leaving a last will and testament which was afterwards duly admitted to probate there, by which he left his entire estate to the defendants, failing to provide for complainants, who are two of his children, and for another child, Charles W. Pinel; that their omission from the will was not intentional on the part of the said Charles T. Pinel, but was made by a mistake or accident; that the laws of the State of Michigan (Comp. Laws, 1897, § 9286),

provide that when any testator shall omit to provide in his will for any of his children, and it shall appear that such omission was not intentional and was made by mistake or accident, such child shall have the same share in the estate of the testator as if he had died intestate; that by virtue of the statute complainants and the said Charles W. Pinel were severally entitled to the same shares in the estate of Charles T. Pinel, deceased, as if he had died intestate; that testator left a widow and nine children, one of whom is since deceased; that after testator's death Charles W. Pinel conveyed all his interest in the estate to the complainant Sarah Slyfield; and that, by reason of the premises, "complainant Herman Pinel is entitled to an undivided one-eighth interest, and complainant Sarah Slyfield to an undivided two-eighths interest, or in all both complainants together to an undivided three-eighths interest in the aforesaid property, which said interests are of the value of $4,500 and upwards over and above all encumbrances." The prayer is, in effect, that the title of complainants to an undivided three-eighths interest in the land may be established.

The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Clay* v. *Field*, 138 U. S. 464, 479; *Troy Bank* v. *Whitehead*, 222 U. S. 39. This case comes within the former class, since the title of each complainant is separate and distinct from that of the other; it being evident that the testator's omission to provide for one of his children by will, based upon mistake or accident, is independent of the question whether a like mistake was made with respect to another child.

The action having been brought in the District Court under the first paragraph of § 24, Jud. Code (act of March 3, 1911, ch. 231; 36 Stat. 1087, 1091), on the ground of diversity of citizenship, it is necessary that the matter in controversy exceed the sum or value of $3,000, and that this shall appear by distinct averment upon the face of the bill, or otherwise from the proofs. The averment that complainant Pinel is entitled to an undivided one-eighth interest, and complainant Slyfield to an undivided two-eighths interest, making together an undivided three-eighths interest in the property in question, "which said interests are of the value of $4,500 and upwards over and above all encumbrances," is not the legal equivalent of saying that the interest of either complainant is of the value of more than $3,000. It is not necessarily to be inferred that the value of an undivided two-eighths is two-thirds of the value of an undivided three-eighths. The probable cost and difficulty of partition, and other like considerations, prevent the application of a mere rule of proportion. Affidavits were submitted *pro* and *con* upon the motion to dismiss, but they do not help matters. Complainants submitted five affidavits, all in a stereotyped form and based on information and belief, stating that the value of the farm as a whole is $15,000 and upwards, but saying nothing about encumbrances nor stating distinctly the value of an undivided one-eighth or two-eighths interest. Defendants submitted four affidavits valuing the farm at not more than $9,000 if free and clear of encumbrances, but showing it encumbered to an amount upwards of $3,500. Were we to accept the highest valuation stated by anybody ($15,000) and deduct from it the amount of undisputed encumbrances, we should have a net valuation less than $11,500. Assuming undivided shares to be of proportionate value, a two-eighths interest would be worth less than $3,000.

Upon the whole, it does not satisfactorily appear that

the interest claimed by either complainant is sufficient in value to confer jurisdiction, and hence the bill was properly dismissed. It is obvious that, in the view we take of the case, the question of collusive joinder becomes immaterial.

Decree affirmed.

UTERHART, TRUSTEE OF STEIN, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued January 24, 1916.—Decided April 3, 1916.

The right to succeed to property of a decedent depends upon, and is regulated by, state law. *Knowlton* v. *Moore*, 178 U. S. 41.

The judicial construction of a will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees.

The court of the State in which the decedent's will was probated and having jurisdiction to construe the same, having decided that, as to the residuary estate, the will involved in this case constituted a trust continuing until after July 1, 1902, and that no beneficiary was entitled to receive anything except on affirmative exercise of discretion conferred upon the executors and trustees, *held* that the interests of the residuary legatees were contingent and not vested prior to July 1, 1902, within the meaning of the Refunding Act of June 27, 1902, except as to such amounts as were actually paid to the legatees prior to that date by the trustees in the exercise of their discretion.

49 Ct. Cl. 709, reversed.

THE facts, which involve the construction of the Refund Act of June 27, 1902, and right to recover certain taxes paid under the War Revenue Tax of 1898 on account of interests passing under a will, are stated in the opinion.

Mr. H. T. Newcomb, with whom *Mr. Morris F. Frey* was on the brief, for appellant:

The judicial construction of the will binds the Government—in denying this the Government is making a collateral attack upon the judgment of a court of competent jurisdiction, this attack being supported by nothing except suggestions of error.

Vanderbilt v. *Eidman*, 196 U. S. 480, applies.

The tax could lawfully have been collected upon amounts awarded to these legatees, in the exercise of the discretionary power provided for in the will, only.

The Government formerly held the view maintained in this brief.

In support of these contentions, see *Attorney-General* v. *Wade*, 79 L. J. K. B. 569; (1910) 1 K. B. 703; *Re Buchar*, 225 Pa. St. 427; *Chanler* v. *Kelsey*, 205 U. S. 466; *Cooper* v. *Reynolds*, 10 Wall. 308; *Dandridge* v. *Washington*, 2 Pet. 370; *Hertz* v. *Woodman*, 218 U. S. 205; *Ingersoll* v. *Coram*, 211 U. S. 335; *Keyser* v. *Mitchell*, 67 Pa. St. 473; *Knowlton* v. *Moore*, 178 U. S. 41; *Laing* v. *Rigney*, 160 U. S. 531; *Lyman* v. *Parsons*, 26 Connecticut, 493; *McCoach* v. *Pratt*, 236 U. S. 562; *McCoy* v. *Gill*, 156 Fed. Rep. 985; *Manson* v. *Duncanson*, 166 U. S. 533; *Muenter* v. *O'Kelley*, 195 Fed. Rep. 480; *Muenter* v. *Union Trust Co.*, 195 Fed. Rep. 480; *Cornett* v. *Williams*, 20 Wall. 226; *Nichols* v. *Eaton*, 91 U. S. 716; *Orr* v. *Gilman*, 183 U. S. 278; *Ryle* v. *United States*, 239 U. S. 658; *United States* v. *Jones*, 236 U. S. 106; *Vanderbilt* v. *Eidman*, 196 U. S. 480; Hanson's Death Duties; Hill on Trustees; Jarman on Wills; Perry on Trusts; Sugden on Powers.

Mr. Assistant Attorney General Wallace, with whom *Mr. William C. Herron* was on the brief, for the United States:

The case is not governed by *United States* v. *Jones*, 236 U. S. 106, or *McCoach* v. *Pratt*, 236 U. S. 562.

The burden of proof to establish that the interests of the legatees were "not absolutely vested in possession" prior to July 1, 1902, rests upon appellants.

Construction of Jones and Pratt decisions. They either mean that the interest of legatees is vested in possession when, (*a*) the right of creditors has been barred; or (*b*) when a final administration of the estate has been effected.

On this record, it must be assumed that everything had been done under New York laws to bar creditors and vest right of legatees.

It must likewise be assumed that final administration of the estate had been effected under the New York laws.

The interests of the various legatees, under paragraph 8 of the will, in the entire residuary estate, irrespective of any question of administration, had "absolutely vested in possession" prior to July 1, 1902.

The will must be read in connection with the New York decree.

The burden of proof is upon the appellants on this point also.

On any proper construction of New York decree, the interests of the legatees were absolutely vested at the common law.

The same result must follow under the act of June 27, 1902, for the reasons given in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158.

In support of these contentions, see also *Burrill* v. *Sheil*, 2 Barb. 451; *Cropley* v. *Cooper*, 19 Wall. 167; *Goebel* v. *Wolf*, 113 N. Y. 405; *Hanson* v. *Graham*, 6 Vesey, 239; *Re Gossling*, 1 Ch. 448; *Re Williams*, 1 Ch. 180; *Johnson* v. *Washington Trust Co.*, 224 U. S. 224; *Lovett* v. *Gillender*, 35 N. Y. 617; *Manice* v. *Manice*, 43 N. Y. 303; *Matter of Cogswell*, 2 Damarest, 248; *Matter of Snedeker*, 114 N. Y. Supp. 936; *McArthur* v. *Scott*, 113 U. S. 340; *Potter* v. *Couch*, 141 U. S. 296; *Sanford* v. *Lackland*, 2 Dillon, 6; *Smith* v. *Edwards*, 88 N. Y. 92; *Traver* v. *Schell*, 20 N. Y.

89; *Vanderbilt* v. *Eidman*, 196 U. S. 480; *Warner* v. *Durant*, 76 N. Y. 133; Jarman on Wills, 6th ed., p. 149; Roper on Legacies, 2d Am. ed., p. 553; Theobald on Wills, Canadian ed., pp. 582–588.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit to recover succession taxes paid by appellants under the act of June 13, 1898 (ch. 448; 30 Stat. 448, 464), on account of interests in personal property passing to the residuary legatees under the will of Conrad Stein, deceased. It was brought under the act of June 27, 1902 (ch. 1160, § 3; 32 Stat. 406), which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." The testator was domiciled in the State of New York, and the will was probated and appellants were appointed executors and trustees in that jurisdiction. The residuary legatees were seven of the nine children of testator; and at the time of his death on April 6, 1900, several of them were minors. All of the seven were living on July 1, 1902. The youngest, Carl Stein, had not attained the age of twenty-one years on that date. The residuary estate amounted to more than $1,000,000, and the taxes collected with respect to it aggregated $17,130.82, being based upon the theory that each of these legatees took a vested seventh interest at the death of the testator. If the taxes had been assessed on the advances actually made by appellants as executors and trustees for the benefit of the residuary legatees, prior to July 1, 1902, they would have amounted to only $745.12.

One of the clauses of the will contained words bequeathing the residuary estate outright to the seven children in equal shares; but this was qualified by inconsistent language in other clauses, and some time prior to January 16,

1902, one of the executors brought suit in the Supreme Court of the State of New York against his co-executors and the beneficiaries for a judicial construction of the will, and a decree was made on the date mentioned, of which the pertinent clauses are set forth in the margin.[1]

[1] "It is further ordered, adjudged and decreed: That it was the intention of the said Conrad Stein, and such is the true meaning and construction of his will, that the whole of his residuary estate, real and personal, should, so far as necessary, be applied to the support and education of his minor children, Josephine Stein, Paula Stein, Ella Stein and Carl Stein during the minorities if Carl Stein survive such period. To that end he gave, devised and bequeathed to Emil Heuel and Alexander Stein his executors and trustees, and to Josephine Stein, his executrix and trustee, all his residuary estate both real and personal, upon trust to receive the rents, issues and profits and income thereof until his son Carl Stein attains the age of twenty-one years, and to apply the same to the support and education of the testator's said minor children, Josephine Stein, Paula Stein, Ella Stein and Carl Stein, until they respectively attain the age of twenty-one years, if Carl Stein survive such period, and on Carl Stein attaining the age of twenty-one years, or sooner dying, the said testator gave, devised and bequeathed the said residuary estate, both real and personal, to his children Charlotte Truebenbach, Wilhelmina Schneider, Elizabeth Heuel, Josephine Stein, Paula Stein, Ella Stein and Carl Stein in equal shares and parts.

"The said executors and executrix and trustees are empowered by the said will to let and lease the said residuary real estate and to make such repairs and improvements upon said residuary real estate as in their judgment may be necessary. After the payment of taxes and other expenses of the administration of the estate, they are to apply so much of the rents of the real estate, and of the income of the personal estate as shall be reasonable and proper, to the support and education of the testator's said minor children during their respective minorities as aforesaid. The rents of the real estate are to be applied first to the uses aforesaid, and after making such application the said executors and executrix and trustees are, from time to time, whenever they shall judge proper, to divide any surplus rents among the testator's said children, Charlotte Truebenbach, Wilhelmina Schneider, Elizabeth Heuel, Josephine Stein, Paula Stein, Ella Stein and Carl Stein in equal proportions, the shares of any minor child to be paid to the guardian of that child's estate.

Testator's personalty passed under the will, and the executors and trustees proceeded under and complied strictly with the directions contained in it, as interpreted and construed by the decree.

The Court of Claims held (49 Ct. Cls. 709) that the interest bequeathed by the will to the residuary legatees was a vested estate, and not a contingent beneficial interest. Citing *Vanderbilt* v. *Eidman*, 196 U. S. 480, and *United States* v. *Fidelity Trust Co.*, 222 U. S. 158.

It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore*, 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees.

It is, however, contended that the will, as thus construed, either gave the residuary estate absolutely to the children by name, share and share alike, postponing pay-

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"The said executors and executrix and trustees are further empowered from time to time during the minority of the said minor children to pay over by way of advance to the said Charlotte, Wilhelmina, Elizabeth, Josephine, Paula, Ella and Carl, in equal amounts or shares, so much of the capital of the testator's residuary personal estate, or the income thereof as in their judgment they may deem reasonable so to pay over, the shares going to any minor children to be paid to the guardian of that child's estate.

"It is Further Ordered, Adjudged and Decreed: That the said executors and executrix are authorized and empowered, after Carl Stein shall have attained the age of twenty-one years, to sell and convey from time to time all or any part of the testator's residuary real estate.

"And it is Further Adjudged and Decreed: That the said executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, except in the exercise of their reasonable discretion, until the said Carl Stein attains the age of twenty-one years."

ment merely until Carl died or reached majority, or that it gave the estate to them absolutely when Carl died or attained majority, meanwhile giving to each child the income of his or her proportionate share. With this view we cannot concur. The decree declares the true construction to be "that *the whole* of his residuary estate, real and personal, should, *so far as necessary*, be applied to the support and education of his minor children, Josephine Stein, Paula Stein, Ella Stein and Carl Stein during the minorities if Carl Stein survive such period." Then follows a clause to the effect that the trustees should apply the income to the support and education of the minor children until they respectively attained the age of twenty-one years, if Carl survived such period, and that on his attaining the age of twenty-one or sooner dying the testator gave, devised, and bequeathed the residue to the seven named (including Carl) in equal shares. A subsequent clause directs the executors and trustees "to apply *so much* of the rents of the real estate, and of the income of the personal estate *as shall be reasonable and proper*, to the support and education of the testator's said minor children during their respective minorities as aforesaid." They are empowered, during the minority of the minor children, "to pay over by way of advance" to the seven, "in equal amounts or shares, *so much* of the capital of the testator's residuary personal estate, or the income thereof *as in their judgment they may deem reasonable* so to pay over." And, finally, "the said executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, *except in the exercise of their reasonable discretion*, until the said Carl Stein attains the age of twenty-one years."

It will be observed not only that the trust continued until the youngest child reached the age of twenty-one, but that no one of the seven was entitled in the meantime to receive anything of either principal or income except

on the affirmative exercise of a discretion conferred upon the executors and trustees.

This having been authoritatively decided to be the true effect and meaning of the will, we are of opinion that the interests to which the residuary legatees succeeded were contingent, and not vested prior to July 1, 1902, within the meaning of the refunding act as construed in previous decisions of this court upon the subject (*Vanderbilt* v. *Eidman*, 196 U. S. 480, 500; *United States* v. *Jones*, 236 U. S. 106, 111; *McCoach* v. *Pratt*, 236 U. S. 562), except with respect to such amounts as were actually paid out of the trust fund by the trustees prior to that date, in the exercise of their discretion; the proper tax upon which, according to the findings, would have been $745.12.

The judgment will be reversed, and the cause remanded with direction to enter judgment in favor of appellants for the tax collected in excess of that amount upon the interests of the residuary legatees.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNITED STATES OF AMERICA v. UNION MANUFACTURING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 628. Argued February 28, 1916.—Decided April 3, 1916.

The offense of false billing and representations specified in the third paragraph of § 10 of the Act to Regulate Commerce as amended June 18, 1910, c. 309, 36 Stat. 549, applies to consignees as well

as to consignors of interstate shipments; and where, as in this case, false representations are made by the consignee in liquidation of the amount payable for freight at destination, the offense is wholly or in part committed at that place and the District Court of that district has jurisdiction of an indictment charging the offense to have been therein committed by the consignee.

The offense under the Act of June 18, 1910, is not analogous to that of obtaining money under false pretenses, but may be committed where the interstate transportation has already been completed and the amount due therefor remains to be adjusted, and with the same effect as though the false representations had preceded the delivery of the goods to the carrier for interstate shipment.

THE facts, which involve the construction of paragraph three of § 10 of the Act to Regulate Commerce as amended June 18, 1910, and the jurisdiction of the District Court of offenses thereunder, are stated in the opinion.

Mr. Assistant to the Attorney General Todd for the United States.

Mr. William G. Brantley for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a writ of error under the Criminal Appeals Act of March 2, 1907 (ch. 2564; 34 Stat. 1246), to review a judgment of the District Court for the Southern District of Florida sustaining a demurrer to an indictment for fraudulently misrepresenting the weights of certain shipments of lumber, in violation of the third paragraph of § 10 of the Act to Regulate Commerce, as amended June 18, 1910 (ch. 309; 36 Stat. 539, 549).[1] The demurrer

[1] "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false

was sustained upon the ground that the statute, as construed by the Circuit Court of Appeals for the Sixth Circuit in *Davis* v. *United States*, 104 Fed. Rep. 136, requires the prosecution to take place in the District where the goods are billed by the shipper and the delivery for transportation takes place, which in this instance was not in the Southern District of Florida, but in Georgia.

The indictment contains ten counts, charging as many different offenses. They are alike in form, and a summary of the first will suffice. It recites that the South Georgia Railway Company was a common carrier by rail engaged in the interstate transportation of yellow pine lumber for hire from Baden, in the State of Georgia, to Greenville, in the Southern District of Florida, and had filed and published schedules and tariffs showing the rate and charge for transportation of such lumber under six inches in thickness in carload lots between those points to be $7 for each carload lot of the weight of 24,000 pounds, excess in proportion; that the schedules and tariffs further provided that when the actual weight of a shipment was not ascertained at point of shipment or at destination or in transit, the freight charges should be based upon an estimated weight of 5,000 pounds for each 1,000 feet; that the Union Manufacturing Company was and is a corporation engaged in shipping said property from Baden to Greenville, and J. T. Prince was its agent,

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weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; . . . shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine," etc.

having general charge and control of the shipments and the payment of freight charges therefor; that on a date specified, and while said schedules and tariffs were in effect, said Railway Company transported from Baden to Greenville for the Manufacturing Company a specified carload of yellow pine lumber under six inches in thickness, and delivered it at Greenville to the Manufacturing Company; that the actual weight of said carload lot was not ascertained at Baden, or at Greenville, or in transit; that the Manufacturing Company thereafter unloaded the lumber from the car and ascertained the number of feet thereof; and that the said Company, and Prince acting as its agent, well knowing the number of feet to be 9,074, then and there falsely and fraudulently represented to the Railway Company that the number of feet was 7,200, in consequence of which the Railway Company charged and the Union Lumber Company paid for the transportation of said lumber less than the lawful charge provided in the schedules and tariffs and at a less rate than the lawfully established rate.

In our opinion, the court below misapplied the decision in *Davis* v. *United States*, 104 Fed. Rep. 136. In that case, which arose under the Act as it stood before the amendment of 1910 (March 2, 1889, c. 382, 25 Stat. 855; 1 Supp. Rev. Stat. 687), the circumstances were very different from those now presented. The acts charged were misrepresentations by false billing and classification of certain property delivered by defendants to the railway company at Cincinnati, Ohio, for transportation thence to Dallas, Texas. The contract of carriage was made at Cincinnati, where defendants resided and carried on business, and the bill of exceptions showed that everything connected with the shipment of the goods except the carriage and delivery took place in Cincinnati. The court said (p. 139): "We think that false billing or other misrepresentation of the goods as stated in the Act, which

results in their being received by the carrier under a contract of carriage thus fraudulently obtained, is the obtaining of transportation within the meaning of the statute. Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete." It was accordingly held that the offense was indictable in the Southern District of Ohio, and not in the Northern District of Texas, within which was the destination of the goods. We are not called upon to either concede or question the propriety of this decision upon the facts that were there presented. General expressions contained in the opinion are of course to be interpreted in the light of those facts. Another case of the same kind is *In re Belknap*, 96 Fed. Rep. 614. These cases are not in point with the present. In each of them the fraud was that of the consignor. Here it is the consignee and its agent against whom fraud is charged. (The fact that the consignee was also the consignor is of no significance, since the fraud alleged was in what it did as consignee.) There the fraud inhered in the making of the contract of carriage; here it had to do with the liquidation of the amount payable for freight at destination.

The Act, by its very terms, applies to consignees as well as to consignors. But as it applies only to interstate transportation, the consignee is normally a resident of a different State, and therefore of a different District, from that where the goods are billed by the shipper and the delivery for transportation takes place. To say, therefore, that the Act contemplates an indictment only in the District where the goods are billed by the shipper is in effect to say that in most cases the consignee either may not be indicted at all or else must be indicted in a District of which he is not a resident, and which in many instances he may never have visited. We hold that the offenses charged in this indictment were "wholly or in

part committed" in the Southern District of Florida. See *United States* v. *Freeman*, 239 U. S. 117.

It is insisted in behalf of defendants in error that since the indictment shows that the transportation had been completed and the lumber delivered to the consignee before the alleged fraudulent representations were made, it cannot be said that the fraud charged amounted to either *obtaining or attempting to obtain transportation for the property* at less than the established rates. If the statute on which the indictment is based were analogous to the familiar acts rendering criminal the obtaining of money or other property by false pretenses, the argument would be cogent. Under such statutes, it is commonly if not universally held to be essential to criminality that the false pretense shall precede the obtaining of the property. *People* v. *Haynes*, 14 Wend. 547, 563, 564; reversing 11 Wend. 557; *State* v. *Church*, 43 Connecticut, 471, 479; *State* v. *Moore*, 111 N. Car. 667, 674; *State* v. *Willard*, 109 Missouri, 242, 247; *Watson* v. *People*, 27 Ill. App. 493, 496.

The statutory provision with which we are dealing has a very different purpose. It is not designed especially to protect the property rights of the carrier, for the offense is made equally punishable whether committed with or without the consent or connivance of the carrier. It originated in the 1889 amendment to the Act to Regulate Commerce (March 2, 1889, c. 382; 25 Stat. 855, 858; 1 Supp. Rev. Stat. 684, 687), and is but one of many provisions enacted by Congress with the object of preventing discriminations and favoritism as between shippers by requiring the publication of tariffs and prohibiting any departure from them. The prohibitions of the original act of February 4, 1887 (c. 104, §§ 2, 3, 6, 10; 24 Stat. 379; 1 Supp. Rev. Stat. 529), were addressed to the carrier alone. The 1889 amendment brought shipper and consignee within the scope of the law, both by enacting that false billing, etc., should be punishable criminally,

and by providing similar punishment for inducing discriminations by the payment of money or other thing of value, solicitation, or otherwise. The June 28, 1910, amendment (c. 309, § 10; 36 Stat. 539, 549), extended the range of the prohibition to certain other fraudulent practices by consignors and consignees committed for like purposes.

In denouncing as criminal "false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or other device or means" employed in order to "obtain or attempt to obtain transportation for such property at less than the regular rates then established," the lawmaker regarded not merely the physical transportation of the property, but the entire transaction through which consignor or consignee might seek to evade the policy of the Act to subject all interstate shipments to uniform rates of charge prescribed in published tariffs. In a case where for any reason the payment of the freight is not made prior to the delivery of the goods to the consignee but remains to be afterwards adjusted, the effort to obtain an advantage not permitted by the schedules may still be exerted through fraudulent representations influencing the adjustment of the freight, with precisely the same effect as if the representations had preceded delivery of the goods. When this is accomplished, there is a fraudulent obtaining of transportation at less than the established rate, within the meaning of the prohibition. Thus it needs only that we interpret the statute according to the plain meaning of the terms employed, in the light of subject-matter and context, in order to conclude, as we do, that the acts set forth in this indictment are punishable criminally under the Act.

The judgment of the District Court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

SOUTHERN EXPRESS COMPANY *v.* BYERS.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 201. Submitted March 2, 1916.—Decided April 3, 1916.

Rights and liabilities in connection with interstate shipments depend upon acts of Congress, the bill of lading, and common-law principles accepted and enforced by Federal courts.

In order to determine the validity and effect of restrictions upon liability contained in bills of lading issued by carrier for interstate shipments, applicable schedules on file with the Interstate Commerce Commission are material, and *held* error to exclude them in this case.

The common-law rule long recognized in the Federal courts is that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation; and so *held,* in an action against an express company, that the consignee of a casket and grave clothes, who admittedly sustanied no pecuniary damage by reason of delay in delivery, was not entitled to recover any damages whatever for mere mental suffering occasioned by such delay.

165 N. Car. 542, reversed.

THE facts, which involve the right of a shipper to recover damages for the mental anguish caused by delay in arrival of an interstate shipment, are stated in the opinion.

Mr. Julius C. Martin, Mr. Thomas S. Rollins, Mr. George H. Wright and *Mr. Robert C. Alston* for plaintiff in error.

There was no appearance or brief filed for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming damages solely on account of mental anguish occasioned by failure promptly to deliver a casket and

grave clothes intended for his wife's burial and accepted by plaintiff in error with knowledge of the facts at Asheville, North Carolina, for transportation to Hickory Grove, South Carolina, Byers recovered a judgment against it for $250, and this was affirmed by the Supreme Court of North Carolina. 165 N. Car. 542.

In defense the Express Company averred: That while engaged in interstate commerce it received the described articles at Asheville and transported them to Hickory Grove; that, as required by act of Congress approved June 29, 1906, and amendments, it had filed a schedule of rates with the Interstate Commerce Commission; that at time of shipment it issued a bill of lading limiting liability to $50; that it had paid the shipper the full amount expended by him in purchasing the articles; that no present liability exists, and especially under the laws of the United States it is not responsible for such damages as those specified.

There was put in evidence a duly executed receipt for $64.17, "being in full payment for one coffin delivered to Southern Express Company at Asheville, N. C., on April 1st, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, South Carolina;" and Byers testified that "the Southern Express Company paid him for all the money he had paid out on the casket and other things contained in the shipment, but did not pay him anything for damages." The bill of lading was also introduced. It specified no value and undertook to restrict the carrier's liability to $50. Clause 1 is copied in the margin.[1] Objection was sustained to a seasonable

[1] 1. In consideration of the rate charged for carrying said property which is regulated by the value and classification thereof and is based upon a valuation of not exceeding fifty dollars for any shipment of one hundred pounds or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company

offer by the company to prove its schedules of rates on file with the Interstate Commerce Commission.

Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts. In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *C., B. & Q. Ry.* v. *Miller*, 226 U. S. 513; *C., St. P., M. & O. Ry.* v. *Latta*, 226 U. S. 519; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639; *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657; *Chicago, R. I. & Pac. Ry.* v. *Cramer*, 232 U. S. 490; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278; *N. Y. & Norfolk R. R.* v. *Peninsula Exchange*, 240 U. S. 34.

It was plain error to exclude the rate schedules.

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shall not be liable in any event for more than fifty dollars ($50) on any shipment of one hundred pounds or less, and for not exceeding fifty cents per pound on a shipment weighing more than one hundred pounds, and said property is valued at, and the liability of this company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as $50 if one hundred pounds or less in weight, or fifty cents per pound if weight exceeds one hundred pounds, or the value declared bears to the actual value if greater.

If the said property is offered for shipment under the special rates named in Sections "D" and "E" of the existing Official Express Classification, it is agreed that the value of the same does not exceed ten dollars ($10) per package, said rates not applying on packages of greater value.

Having been requested in apt time, the trial court refused to charge the jury as follows: "As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant." This instruction should have been given.

The action is based upon a claim for mental suffering only—nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long-recognized common law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation." Cooley on Torts, 3d Ed., page 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in so doing we think they were clearly right upon principle and also in accord with the great weight of authority. *Chase* v. *West. Un. Tel. Co.*, 44 Fed. Rep. 554; *Crawson* v. *West. Un. Tel. Co.*, 47 Fed. Rep. 544; *Wilcox* v. *Richmond & D. R. R.*, 52 Fed. Rep. 264; *Tyler* v. *West. Un. Tel. Co.*, 54 Fed. Rep. 634; *Kester* v. *West. Un. Tel. Co.*, 55 Fed. Rep. 603; *West. Un. Tel. Co.* v. *Wood*, 57 Fed. Rep. 471; *Gahan* v. *West. Un. Tel. Co.*, 59 Fed. Rep. 433; *McBride* v. *Sunset Tel. Co.*, 96 Fed. Rep. 81; *Stansell* v. *West. Un. Tel. Co.*, 107 Fed. Rep. 668; *West. Un. Tel. Co.* v. *Sklar*, 126 Fed. Rep. 295; *Alexander* v. *West. Un. Tel. Co.*, 126 Fed. Rep. 445; *Rowan* v. *West. Un. Tel. Co.*, 149 Fed. Rep. 550; *West. Un. Tel. Co.* v. *Burris*, 179 Fed. Rep. 92; *Kyle* v. *Chicago, R. I. & P. Ry.*, 182 Fed. Rep. 613. But see *Beasley* v. *West. Un. Tel. Co.*, 39 Fed. Rep. 181.

In *So Relle* v. *West. Un. Tel. Co.* (1881), 55 Texas, 308, the Supreme Court of Texas held the addressee of a message might recover damages of a telegraph company because of mere mental suffering. Subsequently the courts of Alabama, Iowa, Kentucky, Nevada, North Carolina and Tennessee, approved and enforced a like rule; those of Dakota, Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Oklahoma, Virginia and West Virginia, definitely rejected the innovation. Many of the pertinent cases are reviewed in *West. Un. Tel. Co.* v. *Chouteau* (1911), 28 Oklahoma, 664, *S. C.*, 49 L. R. A. (N. S.) 206, and note; the general subject is discussed and the authorities cited in Sutherland on Damages, 3d Ed., §§ 975 *et seq.*, Sedgwick on Damages, 9th Ed., §§ 43 *et seq.*, and Shearman & Redfield on Negligence, 6th Ed., §§ 756 *et seq.*

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES concur in the result.

VARNER *v.* NEW HAMPSHIRE SAVINGS BANK.

HAINES TILE & MANTEL COMPANY *v.* SAME.

JACKSON-WALKER COAL & MATERIAL COMPANY *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 264, 265, 266. Argued March 8, 9, 1916.—Decided April 3, 1916.

The essential question in this case being one of fact, and notwithstanding the different conclusions reached by the courts below, this court after consideration thereof holds that the evidence sustains the conclusion of the Circuit Court of Appeals that there was no such commencement of building as would give the mechanics' liens priority over the mortgages on the property within the meaning of the Kansas statute.

216 Fed. Rep. 721, affirmed.

THE facts are stated in the opinion.

Mr. Chester I. Long, with whom *Mr. J. A. Brubacher*, *Mr. George Gardner* and *Mr. A. M. Cowan* were on the brief, for appellants:

The property in controversy was conveyed to the bankrupt on January 3, 1911, and the work of excavating for the foundation was begun on January 3, 1911, and continued on the morning of January 4, 1911.

Under the Kansas statute, as construed by the Supreme Court of that State, a building is commenced when work or labor is begun on the excavation for the foundation, which in this case was on the morning of January 3, as found by the Referee and approved by the District Court.

Even if the bankrupt did the work on January 3 and 4, 1911, with the motive or intent of preferring the mechanic lien holders to the mortgagees, that cannot affect the

rights of the mechanic lien holders, who had no notice or knowledge of such motive or intent.

Mechanic lien claimants are entitled to a lien upon improvements separate from the land, regardless of the priority of the mortgages.

Under the Kansas Statute of Frauds the oral agreement that the mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt and be a first and prior lien upon the property and that the Kimball mortgage should be prior to that of Conklin, was void as to the appellant mechanic lien holders.

In support of these contentions, see: *Ansley* v. *Pasharo*, 35 N. W. Rep. 885; *De Villanueva* v. *Villanueva*, 239 U. S. 293; 20 Am. & Eng. Enc. (2d ed.), 479; *Bell* v. *Coffin*, 2 Kan. A. 337; *Boswell National Bank* v. *Simmons*, 190 Fed. Rep. 735; *Chicago Lumber Co.* v. *Schweiter*, 45 Kansas, 207; *Chicago, R. I. & P. Ry.* v. *Dowell*, 229 U. S. 102; *Coder* v. *Arts*, 152 Fed. Rep. 943; *Conrad* v. *Starr*, 50 Iowa, 470; 27 Cyc. 240, 250; *D. W. & Co.* v. *C., M. & St. Paul Ry.*, 85 Fed. Rep. 876; *Epstein* v. *Steinfeld*, 210 Fed. Rep. 236; *Getto* v. *Friend*, 46 Kansas, 24; *Gordon* v. *Torrey*, 15 N. J. Eq. 112; *Harsh* v. *Moran*, 1 Kansas, 293; *Hathaway* v. *Davis*, 32 Kansas, 693; *Hayes* v. *Fessenden*, 106 Massachusetts, 230; *Huff* v. *Jolly*, 41 Kansas, 537; *Hukill* v. *M. & B. S. R. Co.*, 72 Fed. Rep. 751; *Hussey* v. *Richardson Co.*, 148 Fed. Rep. 598; *Ill. Cen. R. R.* v. *Sheegog*, 215 U. S. 308; *Kansas Mortgage Co.* v. *Weyerhaeuser*, 48 Kansas, 335; *McCrie* v. *Lumber Co.*, 7 Kan. A. 39; *Missouri Lumber Co.* v. *Reid*, 4 Kan. A. 4; *Ohio Bank Co.* v. *Mack*, 163 Fed. Rep. 155; *Osborne* v. *Barnes*, 179 Massachusetts, 597, 61 N. E. Rep. 276; Phillips on Mechanics' Liens (§ 235); *Poff* v. *Adams*, 226 Fed. Rep. 187; *Seitz* v. *Un. Pac. R. R. Co.*, 16 Kansas, 134; *Smith Lumber Co.* v. *Arnold*, 88 Kansas, 463, 468; *Thomas* v. *Mowers*, 27 Kansas, 265; *Tilghman* v. *Proctor*, 125 U. S. 138; *Wagar* v.

Briscoe, 38 Michigan, 587; *Warax* v. *C., N. O. & S. Ry.*, 72 Fed. Rep. 640; *West* v. *Badger Lumber Co.*, 56 Kansas, 287; *White* v. *Kincade*, 95 Kansas, 466.

Mr. Kos Harris and *Mr. Samuel C. Eastman*, with whom *Mr. V. Harris*, *Mr. R. L. Holmes*, *Mr. C. G. Yankey* and *Mr. W. E. Holmes* were on the brief, for appellees.

Mr. Justice McReynolds delivered the opinion of the court.

This is a contest for priority between creditors of a bankrupt. Appellees claim under mortgages upon certain real estate in Wichita alleged to have been recorded before building operations on the property were commenced. Appellants maintain construction began prior to recordation and that they are secured by preferred mechanics' liens created by the Kansas statute. Disagreeing with the District Court but in accord with the referee's opinion, the Circuit Court of Appeals (216 Fed. Rep. 721) held that no "such work as amounted to the commencement of the building within the meaning of the Kansas statute" was performed prior to the time when the mortgages were placed on record, and "that what was done was but a mere pretense at the commencement of a building, done to defeat *bona fide* prior liens." And it accordingly adjudged the mortgage creditors entitled to priority.

The essential question presented is one of fact; and there is sharp dispute in the testimony. Substantial difficulties are disclosed but after considering the evidence we think it sustains the conclusions reached by the Circuit Court of Appeals; and the judgment entered there is accordingly

Affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* HOSTETTER.

ERROR TO THE CIRCUIT COURT OF MARION COUNTY, STATE OF WEST VIRGINIA.

No. 245. Submitted January 25, 1916.—Decided April 10, 1916.

The wages of an employee residing in West Virginia having been garnisheed in the hands of his employer in Virginia, judgment was entered without notice to the employee, none being required under the Virginia statute, and paid by the garnishee; the employee then sued for his wages in West Virginia and the courts of that State refused to enforce the Virginia judgment for want of service; *held* error and that under the full faith and credit provision of the Federal Constitution the judgment of the Virginia court protected the garnishee.

THE facts, which involve the construction and application of the full faith and credit provision of the Constitution of the United States, are stated in the opinion.

Mr. George E. Hamilton, Mr. Francis R. Cross and *Mr. A. Hunter Boyd, Jr.*, for plaintiff in error:

When a creditor of the garnishee's creditor has obtained a judgment against the garnishee debtor in accordance with the laws of the place where the garnishee debtor was personally served, then the garnishee debtor may plead this judgment as a defense to a suit by his own creditor in another jurisdiction, provided he was not negligent in giving his own creditor notice of the attachment proceeding, so that he might have had the opportunity to defend himself. *Chi. &c. Rock Island Ry.* v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 215; *Louis. & Nash. R. R.* v. *Deer*, 200 U. S. 176.

Mr. W. H. Conaway and *Mr. Harry A. Shaw* for defendant in error:

Omission to show in the return of service that it was in the county where the agent resides renders the service invalid, and in such case the court obtains no jurisdiction of the res, for want of service on the garnishee; nor can the garnishee accept or waive service.

Voluntary appearance by garnishee does not confer jurisdiction, nor can he give jurisdiction by voluntary appearance, when not previously served with the order of attachment, nor where an attempted service is invalid. *Penn Co.* v. *Rogers*, 52 W. Va. 451.

Where defendant is a non-resident and cannot be served, jurisdiction of the fund attached cannot be acquired by service of process on the garnishee in Virginia. *Door* v. *Rohr*, 82 Virginia, 259; Va. Code, § 2979; *Bickle* v. *Chrisman*, 76 Virginia, 691; *Roberts* v. *Hickory Co.*, 58 W. Va. 276.

The proper place to attach by garnishment is at the place (and State) of the residence of the debtor. Sams on Attachment, p. 207; *Roller* v. *Murray*, 71 W. Va. 161.

A domestic corporation cannot be garnisheed in another jurisdiction by service upon an agent for debts owing by it to a home creditor, over whose person jurisdiction is not acquired. *Douglas* v. *Phœnix Ins. Co.*, 138 N. Y. 209; *Bullard* v. *Chaffee*, 61 Nebraska, 83; *Balk* v. *Harris*, 30 S. E. Rep. 318.

Exemption of wages by the law of the State in which is the residence of both debtor and creditor and the place where the wages are payable cannot be defeated by garnishment pending in another State, although the debtor is a railroad corporation which has a residence also in such other State. *Ill. Cent. R. R.* v. *Smith*, 19 L. R. A. 577; see also *Singer Mfg. Co.* v. *Fleming*, 23 L. R. A. 210; *American Co.* v. *Ins. Co.*, 40 Am. Rep. 522.

A court has no power to render a judgment condemning

a debt, in a garnishment proceeding, where the situs of the debt is not within the jurisdiction of the court. *Georgia Ry.* v. *Brinson*, 77 Am. Rep. 382; *Buckeye Co.* v. *Fee*, 78 Am. Rep. 743; *Louis. & Nash. R. R.* v. *Nash*, 72 Am. Rep. 181; *Balk* v. *Harris*, 70 Am. Rep. 606.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Hostetter, the defendant in error, a resident of West Virginia, sued in a justice's court in that State for wages due him by the Railroad Company, now plaintiff in error. The defense was that the wages had been paid by the Railroad Company as the result of a garnishment proceeding taken against it in the State of Virginia where it was suable to enforce a judgment rendered in Virginia against Hostetter when he resided in that State and after a domiciliary service on him. The case went from the justice's court for a *de novo* trial to the intermediate court of Marion County where as the result of a verdict against the Railroad Company it was condemned to pay again, the court holding that the Virginia garnishment proceeding was not entitled to be enforced as against Hostetter under the full faith and credit clause of the Constitution of the United States because he was not served with process in such proceeding, he then residing in West Virginia, although extra-judicial notice was given him by the Railroad Company of the proceeding. The case is here on writ of error to review the judgment of the court below affirming that of the intermediate court, and whether proper force was given to the full faith and credit clause is the question for decision.

It is true that in the argument for the defendant in error various suggestions are made as to the insufficiency of the record concerning the existence of the Virginia judgment upon which reliance on the full faith and credit

clause was placed on the ground that the record contains mere recitals with reference to the judgment, etc., etc. For the sake of brevity we do not stop to review these suggestions, although we have considered them all, since we think they are not only without merit but many of them are in effect frivolous because in our opinion the record suffices to establish the facts which were stated by the court below as the basis for its judgment, and which we briefly recapitulate as follows:

The plaintiff in July, 1911, resided at Clifton Forge, Virginia, and was indebted to one Wagner in the sum of $35, for which debt Wagner obtained a judgment against him in a justice's court of Virginia based upon a summons served "on said plaintiff . . . by delivering a copy thereof to the wife of the plaintiff at his usual place of abode. . . . Said record further shows . . . that on the 17th day of September, 1912, a garnishee summons was issued by H. H. Harlow, a Justice of the Peace in the City of Staunton, Virginia, . . . which garnishee summons was directed against the said Baltimore and Ohio Railroad Company . . . charging that it had money, or other personal estate, in its possession or control belonging to the said Hostetter, and requiring the said Railroad Company to appear . . . to answer said garnishment or suggestion; . . . and that on the 3rd day of October, 1912, said justice last above named rendered a judgment against the said Hostetter and the Baltimore and Ohio Railroad Company in favor of the said Wagner in the sum of $38.40, with interest. . . . In this garnishment or suggestion proceeding, no notice or process of any kind was given to or served upon the said Hostetter, he then being a resident of this State [West Virginia], and had been such resident for more than a year previous to the date of the institution of the garnishment proceeding. From this said last-named judgment the Baltimore and Ohio Railroad Company

appealed to the Corporation Court of the City of Staunton, and this appeal was heard and passed upon by said court on the 27th day of February, 1913. So far as the record shows, no notice of such proceeding in the courts of Virginia was given to the defendant until on or about the 14th day of February, 1913, when the said Railroad Company did notify, in writing, the said Hostetter of the pendency of the said garnishment proceedings on appeal in said Corporation Court. . . . It is not contended that any formal notice was given to said Hostetter of the garnishment proceedings for the reason that the Statute of Virginia under which said proceeding was instituted does not require notice to be given a non-resident of that State of the pendency of the garnishment or suggestion."

Although the railroad had paid in virtue of the judgment rendered in the garnishment proceeding taken as above stated, the court agreeing in opinion as we have said with the trial court, held that the garnishment proceeding and the judgment in it were no protection to the Railroad Company because there was no power in the Virginia courts to garnishee in that State in the hands of the railroad a sum of money due by it to an employee domiciled in another State without service on such employee in Virginia, and that the full faith and credit clause imposed no duty to enforce a judgment in garnishment proceedings affected with the want of power stated.

In view of the decisions of this court dealing with the exact situation here presented and expressly holding that the principles upon which the court below based its action were erroneous and could not be upheld consistently with the duty to apply and enforce the full faith and credit clause, we need do no more than cite the cases referred to. *Chicago, R. I. & P. Ry.* v. *Sturm*, 174 U. S. 710; *Harris* v. *Balk*, 198 U. S. 215; *Louis. & Nash. R. R.* v. *Deer*, 200 U. S. 176.

As it follows that the judgment below in so far as it compelled the railroad to pay the second time the sum which it had discharged under the Virginia judgment was erroneous, it must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

BULLEN v. STATE OF WISCONSIN.

ERROR TO THE COUNTY COURT OF WAUKESHA COUNTY, STATE OF WISCONSIN.

No. 262. Argued March 8, 1916.—Decided April 10, 1916.

A deed made by a resident of one State to a person of another State as trustee for certain beneficiaries of personal property consisting of stocks and bonds, donor retaining income for life and power of appointment, and providing that no portion of principal or income be paid over to any person before the donor's death unless by his direction, *held* not to amount to a transfer of the property, and the courts of the donor's State did not err in sustaining the imposition of an inheritance tax under the law of that State on the whole fund as upon a transfer intended to take effect in enjoyment after the donor's death.

A case is on one side of a statutory line or the other; and if on the safe side, it is none the worse legally because the full measure of what the law permits is availed of; to condemn an act as an evasion it must be on the wrong side of the line as indicated by the policy if not by the mere letter of the law.

Notwithstanding such deed of trust and that the trustee had possession in the other State of the certificates of stock and bonds and that State had imposed an inheritance tax thereon owing to the situs thereof, *held* that the imposition of the inheritance tax by the State in which the donor resided was not unconstitutional either as impairing the obligation of contract or as depriving the beneficiaries of their property without due process of law.

143 Wisconsin, 512, affirmed.

THE facts, which involve the constitutionality under

the due process provision of the Fourteenth Amendment of an inheritance tax fixed upon the estate of a resident of the State of Wisconsin, are stated in the opinion.

Mr. John R. Montgomery, with whom *Mr. Louis E. Hart*, *Mr. Jaspersen Smith* and *Mr. Lloyd R. Steere* were on the brief, for plaintiff in error:

The transfer taxed by Wisconsin became effective not under the laws of Wisconsin, but solely under the laws of another jurisdiction, and the tax violates the Fifth and Fourteenth Amendments. *Nunnemacher* v. *State*, 129 Wisconsin, 190; *Beals* v. *State*, 139 Wisconsin, 544; *State* v. *Pabst*, 139 Wisconsin, 561; *Re Bullen*, 143 Wisconsin, 512.

The transfer transaction occurs under or by virtue of, or the right to receive property is derived through, the laws of Wisconsin. The State has no extra-territorial jurisdiction. *Bliss* v. *Bliss*, 221 Massachusetts, 201; *Walker* v. *Mansfield*, 109 N. E. Rep. 647; *State* v. *Brevard*, 62 Nor. Car. 51; *Alvany* v. *Powell*, 55 N. Car. 51; *Bittinger Est.*, 129 Pa. St. 338; *Re Joyslin Est.*, 76 Vermont, 88; *Re Swift*, 137 N. Y. 77; *Clark* v. *Clark*, 178 U. S. 186.

A decedent's personal property in a foreign jurisdiction will be subject, in a proper case, to taxation both at home and in the foreign State, if the laws of both States are requisite to the legal transfer of the property at the owner's death and it does not matter that the machinery of the law would not need to be invoked in the particular case (*Blackstone* v. *Miller*, 188 U. S. 189; *Mann* v. *Carter*, 74 N. H. 345; *Hopkins' Appeal*, 77 Connecticut, 644); but an inheritance tax cannot be levied by any State unless the operation of its law is necessary in order to effect the transfer. *Walker* v. *Mansfield*, 109 N. E. Rep. 647; *Re Clark Est.*, 37 Washington, 671; *Clark* v. *Treasurer*, 218 Massachusetts, 292; *Eidman* v. *Martinez*, 184 U. S. 578; *Woodruff* v. *Atty. Gen.*, 1908 App. Cas. 508; *Moore* v. *Ruckgaber*, 184 U. S. 593; *State* v. *Brevard*, 62 N. Car. 51;

Alvany v. *Powell*, 55 N. Car. 51; *Re Joyslin Est.*, 76 Vermont, 88.

The inheritance tax laws of Wisconsin and Illinois are both adopted from New York. Both are, therefore, subject to the same rules of interpretation. *Est. of Bullen*, P. R. 102; *People* v. *Griffith*, 245 Illinois, 532.

These are corollaries to the entire line of decisions by this court of questions relating to inheritance taxes. Cases *supra* and see *Mager* v. *Grima*, 8 How. 490; *Carpenter* v. *Commonwealth of Pa.*, 17 How. 456; *Scholey* v. *Rew*, 23 Wall. 331; *United States* v. *Fox*, 4 Otto, 315; *Clapp* v. *Mason*, 4 Otto, 589; *United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41; *Plummer* v. *Coler*, 178 U. S. 115; *Murdock* v. *Ward*, 178 U. S. 139; *Orr* v. *Gilman*, 183 U. S. 278; *Keeney* v. *New York*, 222 U. S. 525.

An inheritance tax is a lawful exercise of the taxing power "only when some necessary incident of the transfer transaction for its efficacy" upon the law of the State levying the tax. *Walker* v. *Mansfield*, 109 N. E. Rep. 647; *Tilt* v. *Kelsey*, 207 U. S. 43; *Re Howard Est.*, 80 Vermont, 489.

Inasmuch as the transfer transaction in this case could be carried to completion "without the aid of Wisconsin law," there was no transfer transaction or right to receive property under Wisconsin law. The right or privilege taxed by Wisconsin did not exist, and judgment against a citizen of the United States for a tax on something which does not exist, deprives him of his property without due process of law and takes his private property for public use without just compensation. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Buck* v. *Beach*, 206 U. S. 392; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Kentucky* v. *West India Oil Co.*, 138 Kentucky, 828.

The reason which exempts from inheritance taxation real property in a State foreign to its owner's domicile applies with equal force to the personal property held under trust assignment. Real estate in a foreign jurisdiction is never subject to an inheritance tax at the domicile of its owner. Cases *supra* and see *Connell* v. *Crosby*, 210 Illinois, 380; *Orr* v. *Gilman*, 183 U. S. 278; *Clarke* v. *Clarke*, 178 U. S. 186.

The maxim "mobilia sequuntur personam" may only be resorted to when convenience and justice so require. It is not allowed to obscure the facts when facts become important. *Blackstone* v. *Miller*, 188 U. S. 189; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194.

It is within the power of any citizen of the United States to fix the situs of his personal property at a place other than his domicile.

The judgment levying the Illinois Inheritance Tax being entitled to full faith and credit is conclusive on the Wisconsin courts as to the law under which the transfer transaction became effective. Cases *supra*.

The assignment in trust having been made upon actual consideration as not a gift but a valid contract and the law taxing it impairs the obligation of the contract. *Gelsthorpe* v. *Furnell*, 20 Montana, 299; *Chanler* v. *Kelsey*, 205 U. S. 466.

The levy of tax by Wisconsin on the amount already paid for the inheritance tax in Illinois is erroneous because the amount so paid never passed to the plaintiffs in error. A tax upon this deprives them of their property without due process of law. *United States* v. *Perkins*, 163 U. S. 625; *People* v. *Richardson*, 269 Illinois, 275.

Courts do not favor double taxation. Where it is necessary they regret the necessity. *Blackstone* v. *Miller*, 188 U. S. 189; *In re Strong*, 17 N. J. Law J. 234; *Keeney Est.*, 222 U. S. 525, distinguished.

Mr. Walter Drew, with whom *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a proceeding to fix the inheritance tax upon the estate of George Bullen, deceased, a resident of Wisconsin. The Supreme Court of the State affirmed a judgment for a tax upon a fund of nearly a million dollars which the heirs and next of kin say cannot be taxed in Wisconsin without violating the Fourteenth Amendment and the contract clause of the Constitution of the United States. 143 Wisconsin, 512.

The facts are simple. Bullen formerly had lived in Chicago and continued to do some business there after moving to Wisconsin, which he did in 1892. He kept in Chicago the bonds, stocks and notes constituting the fund and in 1902 conveyed them to the Northern Trust Company of that City upon certain trusts. In 1904 by virtue of powers reserved he repossessed himself of the fund, but in 1907 he conveyed it to the company upon the former trusts, again. The limitations, so far as material, were of relatively small sums to a sister and niece residing in Massachusetts, and, subject to those gifts, of one-third of the income to his widow for life and the rest of the income and the principal to his four sons. But the instrument contained the following clause: "Fifth. I, the donor, expressly reserve the right to direct and control the disposition of the said trust property and estate, to revoke and vacate this trust at any time during my life, to enter into and upon and take possession of the same, or any part thereof, to require a reconveyance to me of the said trust property, or any part thereof, and to dispose of it as I may see fit. During my lifetime the principal and income shall be used for such beneficiaries

and in such manner as I may from time to time appoint, and in default of any appointment during my lifetime, and, at all events, after my death, the said income and the said principal shall be applied, paid over or held as herein provided." It also declared that no portion of principal or income should be paid under some of the leading clauses before Bullen's death unless by his direction. In fact he received the whole income during his life. The Supreme Court held that an inheritance tax was due in respect of the whole fund as upon a transfer intended to take effect in enjoyment after the donor's death.

The deeds of trust were not a merely simulated transaction. Bullen made a will shortly after the first transfer, which was of similar tenor but which, it is found, 'has not been probated,' perhaps because the parties relied upon the deeds. The deeds transferred title and they had a purpose. Bullen at the time was suffering from locomotor ataxia, his wife also was in precarious health and the chief instrument contemplated the possible disability of both. The ultimate limitations would operate unless revoked, which they were not. But Bullen, as has been seen, reserved an absolute power of control over all of his gifts and exercised it during his life by a revocation, (followed, to be sure, by a reconveyance upon the same terms), and by taking all the income of the fund. The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax, "To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." Sugden, Powers, 8th Ed., 396. See Gray, Perpetuities, § 526b, 1st Ed., pp. 334, 335. We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it

is on the wrong side of the line indicated by the policy if not by the mere letter of the law. What we do say is that the Supreme Court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute, that there is no constitutional objection to its doing so, and that although Illinois also has taxed the fund, as it might, we are not aware that it has attempted to qualify the effect that Wisconsin has given to the power, and do not intimate that it could have done so, if it had tried. See *Hawley* v. *Malden*, 232 U. S. 1, 13.

The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the States where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock. *Blackstone* v. *Miller*, 188 U. S. 189, 204. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 589, 590, 592. *Thomson* v. *Advocate General*, 12 Cl. & Fin. 1, 18, 21. *Frothingham* v. *Shaw*, 175 Massachusetts. 59. *Matter of Swift*, 137 N. Y. 77, 88. *Mann* v. *Carter*, 74 N. H. 345. *Appeal of Hopkins*, 77 Connecticut, 644. *Hartman's Case*, 70 N. J. Eq. 664. The same would be true of a universal succession established by will, and the notion of privity or identity of person that is recognized in these cases has been carried over to more limited bequests and in some degree to deeds. *Norcross* v. *James*, 140 Massachusetts, 188. The principle that allows the tax is to be

applied, if ever, to a disposition that operates upon the great mass of the donor's estate and that takes effect only upon his death, at least so far as concerns the persons before this court, the donor's widow and sons. *Lines's Estate*, 155 Pa. St. 378.

It is suggested that there was a subordinate error in not deducting the amount of the Illinois inheritance tax. But this appears not to have been assigned in the appeal to the Supreme Court of the State, and therefore we need not inquire whether there was any constitutional obstacle to the State of Wisconsin adopting the gross fund disposed of rather than the net amount received as the measure of the tax.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY *v.* PRESCOTT.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 358. Argued February 23, 1916.—Decided April 10, 1916.

Whether the contract based on a bill of lading of an interstate shipment issued pursuant to the Act to Regulate Commerce has been discharged is a Federal question.

Transportation, as regulated by the Act to Regulate Commerce, includes the services of a connecting carrier as warehouseman of the goods after arrival at point of destination and before actual delivery to the consignee.

Retention by the carrier of part of an interstate shipment, after arrival at destination, notice to, and payment of the freight by, the consignee, *held* in this case to be a terminal service forming part of the transportation in the sense of, and governed by, the Act to Regulate Commerce.

With respect to service governed by the Act to Regulate Commerce, the rule that both carrier and shipper are bound by, and cannot alter, the terms of service as fixed by the filed regulations, applies

not only to rates but also to other stipulations relating to services and facilities within the purview of the act, including liability as warehouseman after arrival of the goods at destination and before removal by the consignee.

The contract of a bill of lading of an interstate shipment is still in force until actual delivery to the consignee; and *held* that the mere giving of a receipt by the consignee and payment of freight but leaving the goods with the carrier did not, in this case, amount to actual delivery and affect the liability of the carrier under the stipulations as to liability contained in the bill of lading.

The measure of liability of a carrier of an interstate shipment under the bill of lading issued pursuant to the Act to Regulate Commerce is a Federal question and the obligation is to be governed under the Act by uniform rule in the place of the diverse requirements of state legislation and decisions; nor is the question less a Federal one because resolved by application of general principles of common law.

Under a stipulation in a bill of lading of an interstate shipment that the carrier shall be liable, as warehouseman only, for goods after arrival at destination and not removed within the specified time, the carrier is liable only for negligence; and if the loss admittedly occurs by fire the burden is on the plaintiff to prove negligence, notwithstanding the rule may be different under state law.

99 So. Car. 422, reversed.

THE facts, which involve the liability of an interstate carrier as warehouseman of goods after arrival at destination, are stated in the opinion.

Mr. Frank G. Tompkins, with whom *Mr. Benjamin L. Abney* was on the brief, for plaintiff in error.

Mr. J. Willard Ragsdale, with whom *Mr. W. H. Townsend* and *Mr. J. William Thurmond* were on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought to recover for the loss of nine boxes of shoes which were destroyed by fire, on July 4,

1913, while in the possession of the Southern Railway Company, plaintiff in error. These boxes were part of a lot of thirteen boxes which had been shipped on June 21, 1913, at Petersburg, Virginia, by the Seaboard Air Line Railway and connections, consigned to W. E. Prescott, defendant in error, at Edgefield, South Carolina, and had arrived at Edgefield over the line of the Southern Railway Company on June 23, 1913. The plaintiff alleged three causes of action against the latter Company (1) as common carrier (2) as warehouseman and (3) for penalty because of failure to adjust and pay the claim, after notice, as provided by law. The answer of the Railway Company, with a general denial, set up that the shipment was interstate and governed by the Act to Regulate Commerce. At the close of the plaintiff's case, the Railway Company moved for a non-suit and decision was reserved. The Railway Company then put in evidence the tariff rules, filed with the Interstate Commerce Commission, which governed the shipment. These provided that the reduced rates specified would "apply on property shipped subject to the condition of carrier's bill of lading," and that otherwise there would be an increased charge, as stated. One of the stipulations of the bill of lading was that "property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival" might be kept in car, depot or warehouse, "subject to reasonable charge for storage and to carrier's responsibility as warehouseman only." The freight bill contained the provision: "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this Company."

The agent for the Railway Company (confirming what had been said by the plaintiff's witness) testified that after notice of the arrival of the goods, the consignee had paid the entire freight charges, that he (the company's agent) "had accepted the freight" and had the consignee's

"receipt for the goods." Four boxes were then taken away and the rest were permitted to remain to meet the consignee's convenience in removal. The agent further testified. "Q. What was the agreement with reference to holding those goods? A. He just wanted to know if it would be agreeable to leave them there, and I said it would be. Q. You did not make any charges for storing them? A. No, sir. Q. And did not expect him to pay any? No, sir." The consignee's representative had testified that, while nothing had been said on the point, he expected to pay storage.

At the close of the testimony, the plaintiff withdrew his causes of action against the defendant as common carrier and for the penalty, and the case went to the jury solely with respect to the liability of the defendant as warehouseman. The Railway Company moved for a direction of a verdict upon the ground that, under the Federal Act and the tariff regulations, the bill of lading defined the rights of the parties. The motion was denied. The trial court submitted to the jury the question of liability for the care of the goods as one arising under the state law which cast upon the defendant the burden of showing that it was not negligent. The position of the Railway Company, as shown by its requests for instructions which were denied, was that the shipment had not lost its interstate character; that the provisions of the bill of lading were controlling; that the defendant's liability as warehouseman was governed by Federal law; and that the burden was upon the plaintiff to show negligence as a basis for recovery.

Judgment upon a verdict in favor of the plaintiff was affirmed by the Supreme Court of the State. 99 So. Car. 422. With respect to the Federal question, the court said: "The defendant claims that inasmuch as this is an interstate shipment, the Federal statute governs. The question does not legitimately arise in this case for the reason

that the appellant moved for a non-suit on the ground that 'the evidence here shows that this freight arrived here on the 23rd of June and that the freight was paid and receipted for by the agent of Dr. Prescott; he came for it and paid the freight and I submit that where a common carrier delivered freight in good order, and has it in its depot and paid for then its liability as a common carrier ceases.' The court reserved its decision on that question and before it was announced, the plaintiff withdrew the cause of action as common carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal statute under which it might have arisen is not before this court and the only question argued which we can consider is the question as to warehouseman." The court then applied the rule of liability as defined by the state law. *Id.*, p. 424. And this writ of error has been prosecuted.

As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that there was no dispute as to the fact that the goods had arrived, that the consignee had paid the freight and signed a receipt for the goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.

By the Act to Regulate Commerce (§ 1) the 'transportation' it regulates is defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." It is made the duty of the carrier "to provide . . . such transportation upon reasonable request therefor." All charges made for "any service" rendered in such transportation must be "just and reasonable." Section 6 requires that the carrier's schedules, printed as provided, "shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." And it is further provided, in the same section, that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation"—that is, as defined—"except such as are specified in such tariffs." The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act. Thus, in the case of *C., C., C. & St. L. Railway Co.* v. *Dettlebach*, 239 U. S. 588, it was held, with respect to goods lost through the negligence of the terminal carrier while in possession as warehouseman under this stipulation, that the provision

of the bill of lading limiting liability to the declared value of the goods was applicable. The court deemed it to be evident "that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like." It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Rwy.* v. *Mugg*, 202 U. S. 242; *Kansas Southern Rwy.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 112; *Louis. & Nash. R. R.* v. *Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155, 166; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend "any privileges or facilities," save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal Act, regard must of course be had to the substance of the transaction. The question is not one of form, but of actuality. *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111, 126; *Louisiana R. R. Comm.* v. *Tex. & Pac. Rwy.*, 229 U. S. 336, 341; *Illinois Central R. R.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163; *Pennsylvania R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 458. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a "reasonable charge for storage" pending delivery that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service.

Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse re-

quirements of state legislation and decisions. *Adams Exp. Company* v. *Croninger*, 226 U. S. 491, 506, 509, 510; *M., K. & T. Rwy.* v. *Harriman*, 227 U. S. 657, 672; *Boston & Maine R. R.* v. *Hooker*, *supra*; *M., K. & T. Rwy.* v. *Harris*, 234 U. S. 412, 420; *Charleston &c. R. R.* v. *Varnville Furniture Co.*, 237 U. S. 597, 603; *C., C., C. & St. L. Ry.* v. *Dettlebach*, *supra*; *N. Y., P. & N. R. R.* v. *Peninsula Exchange*, 240 U. S. 34. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law. *Adams Express Co.* v. *Croninger*, *supra*; *M., K. & T. Rwy. Co.* v. *Harriman*, *supra*. It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability "as warehouseman only." The Railway Company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence. *Cau* v. *Tex. & Pac. Rwy.*, 194 U. S. 427, 432; *Transportation Company* v. *Downer*, 11 Wall. 129, 135; *DeGrau* v. *Wilson*, 17 Fed. Rep. 698, 700, 701, affirmed, 22 Fed. Rep. 560; *Clafin* v. *Meyer*, 75 N. Y. 260, 262, 263; *Whitworth* v. *Erie Ry.*, 87 N. Y. 413, 419, 420; *Draper* v. *D. & H. C. Co.*, 118 N. Y. 118, 122, 123; *St. L., I. M. & S. Ry.* v. *Bone*, 52 Arkansas, 26; *Lyman* v. *Southern Railway*, 132 No. Car. 721; *Lancaster Mills* v. *Merchants' Co.*, 89 Tennessee, 1; *National Line S. S. Co.* v. *Smart*, 107 Pa. St. 492; *Denton* v. *C., R. I. & P. R. R.*, 52 Iowa, 161;

Cox v. *Central Vermont R. R.*, 170 Massachusetts, 129; *Yazoo & Miss. Valley R. Co.* v. *Hughes*, 94 Mississippi, 242; 24 Am. Dec. 150–153, *note;* 22 L. R. A. (N. S.), *note* 975. In the present case, it is undisputed that the loss was due to fire which destroyed the Company's warehouse with its contents including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the Railway Company. The trial court denied the motion for a direction of a verdict and charged the jury that "the burden of showing that there was no negligence is on the defendant." Applying the rule established by the state decisions (*Brunson* v. *Atlantic Coast Line R. R.*, 76 So. Car. 9; *Fleischman* v. *Southern Railway*, 76 So. Car. 237; see also *Wardlaw* v. *S. C. R. R.*, 11 Rich. 337), the Supreme Court of the State overruled the defendant's objection and sustained the judgment. 99 So. Car. 424. It has been recognized by the state court, as was said in the *Fleischman Case*, *supra*, that the rule it applies is a "somewhat exceptional rule" to which the court adheres "notwithstanding the great number of opposing authorities in other jurisdictions." 76 So. Car. 248.

For the reasons we have stated, we think that the obligation of the Railway Company was not governed by the state law and that, in this view, the exceptions of the plaintiff in error were well taken.

Judgment reversed.

FAIRBANKS STEAM SHOVEL COMPANY *v.* WILLS, TRUSTEE IN BANKRUPTCY OF FEDERAL CONTRACTING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 82. Argued December 2, 3, 1915.—Decided April 10, 1916.

A corporation organized under the laws of Illinois is to be deemed a resident of the State within the meaning of the Chattel Mortgage Act of that State and the county of residence is the county where its principal office is located although it may transact business in another county.

A corporation can only change its residence within the State of its incorporation by complying with the law of the State.

As the Illinois corporation which made the chattel mortgage in this case had its principal office in Cook County, and that office was never legally established in any other county, a mortgage which was recorded in a different county did not comply with the Recording Act of Illinois, and, as against the trustee in bankruptcy, was invalid.

Even though the bankrupt did not have its principal place of business in the district where the bankruptcy proceeding was instituted, that objection can be waived by appearing and answering to the merits in a proceeding instituted to obtain possession of assets of the bankrupt.

An adjudication of bankruptcy is not open to collateral attack, and the question of capacity of the trustee to sue is waived if not raised in the trial court.

If the chattel mortgage is not valid against the trustee because not properly recorded under the state law, the mortgagee's title is not perfected by taking possession after the filing of the petition and before adjudication.

Under § 47 a-2 as amended by the Act of June 25, 1910, trustees have the right and remedies of lien creditors as against unrecorded transfers; and, the estate being in *custodia legis*, the trustee's title relates back to the date of filing the petition.

212 Fed. Rep. 688, affirmed.

THE facts, which involve a controversy arising in a bankruptcy proceeding and the relative rights of a mort-

gagee of certain chattels of the bankrupt and the trustee in bankruptcy, are stated in the opinion.

Mr. Elisha B. Durfee, with whom *Mr. John A. Bellatti*, *Mr. Walter Bellatti* and *Mr. George B. Scofield* were on the brief, for appellant.

Mr. Elbert C. Ferguson, *Mr. William Mumford* and *Mr. John C. Burchard* for appellee, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a controversy arising in a bankruptcy proceeding. On December 30, 1912, a creditors' petition in bankruptcy was filed in the United States District Court for the Southern District of Illinois against the Federal Contracting Company, a corporation of that State, and on March 25, 1913, it was adjudicated a bankrupt. Between those dates, and on March 6, the Fairbanks Steam Shovel Company, the present appellant, without actual knowledge of the filing of the petition, seized a certain floating steam dredge, then in possession of the Contracting Company at Beardstown, Cass County, which is in the Southern District of Illinois; doing this by virtue of a chattel mortgage given by the Contracting Company to appellant on June 8, 1912, the dredge then being in the possession of the mortgagor at Beardstown. After the adjudication of bankruptcy but before the appointment of a trustee, the bankrupt filed a petition against appellant in the bankruptcy proceeding, setting up that the mortgage was not acknowledged or recorded in Cook County, Illinois, where the principal office of the bankrupt was located by its charter, and for this reason was invalid against the trustee in bankruptcy to be appointed, and praying that appellant might be restrained from selling

the dredge as it threatened to do. The court entered a temporary restraining order, which was served; appellant, without questioning the jurisdiction of the court, appeared and answered, admitting that it had taken possession of the dredge under the provisions of the mortgage, alleging that the mortgage was duly executed and was given to secure a part of the purchase price of the dredge, and that at the time of its execution the bankrupt, through its officers, represented to appellant that its principal place of business was at Beardstown; and further that before the adjudication of bankruptcy appellant took actual possession of the dredge and thereby perfected its title thereto; and asking that the injunction be dissolved, etc. No trustee having yet been appointed, it was ordered by the court, upon a stipulation between the parties, that the sale should proceed, under an arrangement providing, among other things, that if appellant purchased the dredge it should hold it subject to the decision of the controversy. The sale was held accordingly, and the dredge was purchased by appellant. Thereafter appellee was appointed trustee in bankruptcy, and was substituted as a party to the controversy in place of the bankrupt. The matter was heard before the referee, who reported in favor of the trustee. The District Court overruled exceptions and confirmed the report; and, on appeal, the Circuit Court of Appeals affirmed the decree. 212 Fed. Rep. 688. The appeal to this court antedated the Act of January 28, 1915, ch. 22, §§ 4 & 6; 38 Stat. 803, 804.

The principal question is whether the chattel mortgage was properly acknowledged and recorded so as to be valid against the trustee in bankruptcy.

The law of Illinois respecting chattel mortgages may be found in ch. 95 of Hurd's Rev. Stat. 1909. Paragraph 1 provides that no such mortgage shall be valid as against the rights and interests of any third person unless possession shall be delivered to and remain with the grantee,

or the instrument shall provide for the possession of the property to remain with the grantor and the instrument be acknowledged and recorded as thereinafter directed. Paragraph 2 provides that such instrument shall be acknowledged before a specified officer of "the county where the mortgagor resides," if a resident of the State, with a proviso that in counties having a population of more than 200,000 (this applies to Cook County), such instrument, "if the mortgagor is a resident of the State," shall be acknowledged before one of several designated officers of the town, precinct, district, or county "in which the mortgagor resides." By par. 4, the mortgage, when so acknowledged, "shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded."

The bankrupt was incorporated in the year 1905 under a general act (Hurd's Rev. Stat. 1909, ch. 32), the second paragraph of which requires the organizers to make, subscribe, and acknowledge a statement setting forth the name of the proposed corporation, the object for which it is formed, its capital stock, the location of the principal office, etc., which is to be filed in the office of the Secretary of State. If the object of the proposed corporation is clearly and definitely stated and is a lawful object, the Secretary of State issues to the corporators a license as commissioners to open books for subscription to the capital stock. After the stock is subscribed, directors or managers elected, etc., the Secretary of State (par. 4) issues a certificate of the complete organization of the corporation. But, before this is done, the corporation must "file with the Secretary of State a statement setting forth the post-office address of its business office, giving street and number." (Act of May 10, 1901; Laws 1901, p. 124; Hurd's Rev. Stat. 1909, ch. 32, par. 192.)

Other sections (ch. 32, par. 50 *et seq.*) contain elaborate

provisions to be complied with when the directors of any corporation "may desire to change the name, to change the place of business, to enlarge or change the object for which such corporation was formed, to increase or decrease the capital stock," etc. There is to be a special meeting of the stockholders, called on notice mailed to each stockholder and published in a newspaper, and votes representing two-thirds of all the stock of the corporation shall be necessary for the adoption of the proposed change; an appropriate certificate is to be filed in the office of the Secretary of State, and a like certificate made a matter of record in the county where the principal business office of the corporation is located; and a notice of the change is also to be published in a newspaper for three successive weeks.

The statement made by the organizers of the bankrupt corporation declared: "The location of the principal office is in the City of Chicago, in the County of Cook, and State of Illinois." A license was issued to them as commissioners to open books for subscription to the capital stock, and in due course they made their report to the Secretary of State, in which it was stated: "That the post-office address of the business office of said company is at No. — Park Hotel, streets not numbered, in the City of Beardstown, in the County of Cass, and State of Illinois." Upon receipt of this, the Secretary of State issued a certificate of complete organization, including in it the first statement, the report of the commissioners, and other papers filed in his office respecting the organization of the corporation, as required by the statute. The first meetings of the stockholders were held in Chicago, and another stockholders' meeting was held there about two years later. All other recorded meetings of stockholders and directors were held in Beardstown. An office was nominally maintained in Chicago, but no records or books of account were kept nor any business transacted

there. So far as the practical conduct of the business was concerned, and to all outward appearances, the principal office was in Beardstown. But no change of "the place of business" was made in the manner prescribed by the statute.

The chattel mortgage was made, acknowledged, and recorded in Cass County, and was never either recorded or acknowledged in Cook County.

The Circuit Court of Appeals held, affirming the District Court, that the "residence" of the bankrupt was in Chicago, which is in Cook County, and that therefore the mortgage, having never been properly acknowledged or recorded, was invalid as against the trustee in bankruptcy.

This, in our opinion, was a correct disposition of the question. The statutes of Illinois recognize the propriety of a fixed location for the principal office of a corporation, requiring this to be specified in the certificate of organization and to be left unchanged except on formal action by two-thirds in interest of the stockholders. Whether "principal office" and "business office" are synonymous is not entirely clear, and we are referred to no decision by the state courts throwing light upon this. But, supposing them to be synonymous, it does not seem to us that the report of the commissioners for stock subscriptions can have the effect of establishing the office in Cass County, for we find no authority in the commissioners to materially change the location of the principal office as formally declared by the organizers.

We are of opinion that a corporation organized under the laws of Illinois is to be deemed a resident of the State within the meaning of the chattel mortgage act, and that the county of its residence must be taken to be the county in which its principal office is located. So far as the decisions of the state courts throw light upon the question they bear out this view. *Bank of North America* v. *Chicago &c. R. R.*, 82 Illinois, 493, 496; *Hewitt* v. *General*

Electric Co., 164 Illinois, 420, 425. And a similar view prevails in other jurisdictions. In *Ex parte Schollenberger*, 96 U. S. 369, 377, this court, by Mr. Chief Justice Waite, said: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws." And in *Galveston &c. Ry.* v. *Gonzales*, 151 U. S. 496, 504, the court, by Mr. Justice Brown, said: "In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place." A case in point with the present is *First Natl. Bank* v. *Wilcox*, 72 Washington, 473. And see *Western Transportation Co.* v. *Scheu*, 19 N. Y. 408; *Union Steamboat Co.* v. *Buffalo*, 82 N. Y. 351, 355; *Pelton* v. *Transportation Co.*, 37 Oh. St. 450; *Jenkins* v. *California Stage Co.*, 22 California, 538; *Cohn* v. *Central Pacific R. R.*, 71 California, 488.

It is hardly necessary to say that whatever equities, if any, arose out of the mortgagor's representation that its principal place of business was at Beardstown, or out of the fact that the mortgage was given to secure a part of the purchase price of the dredge, were confined in their effect to the immediate parties, and could not operate to estop the trustee in bankruptcy, representative of the interests of creditors for whose protection the recording act was passed.

It is objected by appellant that a determination that the bankrupt corporation had its principal place of business and therefore its residence in Cook County, which is in the Northern District, shows at the same time that the United States District Court for the Southern District of

Illinois had no jurisdiction to entertain the proceeding in bankruptcy under § 2 of the Bankruptcy Act, and hence no jurisdiction over the present controversy. (See *Harris* v. *First Nat'l Bank*, 216 U. S. 382.) As to this, the Circuit Court of Appeals correctly held that appellant, by answering and making defense upon the merits, consented to the jurisdiction, so that whether, under §§ 23a and 23b, construed together with § 70e as amended, consent to the jurisdiction of the District Court was required need not be considered.

On like grounds, it is insisted that the adjudication of bankruptcy was invalid, and that the trustee had no capacity to sue. But the adjudication is not open to collateral attack, and the question of capacity was waived because not raised in the trial court.

Appellant's title was not perfected, as against the trustee in bankruptcy, by taking possession of the dredge under the mortgage after the filing of the petition in bankruptcy and before the adjudication. Since the amendment of § 47a-2 of the Bankruptcy Act by the Act of June 25, 1910 (ch. 412, § 8; 36 Stat. 838, 840), trustees have the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer. The estate was *in custodia legis* from the filing of the petition, and the title of the trustee related back to that date. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Everett* v. *Judson*, 228 U. S. 474, 478.

Other questions are raised, but they are unsubstantial and require no particular mention.

Decree affirmed.

STATE OF GEORGIA *v.* TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER AND IRON COMPANY, LIMITED.

IN EQUITY.

No. 1, Original. Decree, entered April 3, 1916.

Ordered to be entered, and former decrees modified as to escapement of fumes, as to records to be kept in regard thereto, and also as to expense of inspection and division of costs.

THIS cause coming on to be heard on the report of the Inspector heretofore appointed to observe operations of the plant and works of defendant The Ducktown Sulphur, Copper and Iron Company, Limited, and upon consideration thereof

It is now here ordered, adjudged, and decreed (and all former decrees are accordingly modified) as follows:

1. That defendant The Ducktown Sulphur, Copper and Iron Company, Limited, hereafter shall not permit escape into the air from its works of fumes carrying more than 45% of the sulphur contained in green ores subjected to smelting.

2. That it shall not hereafter from April 10 to October 1 in any year permit escape into the air of gases the total sulphur content of which shall exceed 25 tons during one day and not more than 50 tons per day shall be permitted to escape at other times.

3. That it shall keep a daily record of the amount of green ores smelted, sulphur in green ore, acid made, sulphur in acid, per centum of sulphur recovered, sulphur escaping, and per centum of sulphur escaping so that statements may be compiled therefrom substantially the same as Table 3, page 19, printed report of the Inspector.

It shall also keep a weather record showing direction and velocity of wind, humidity, temperature and pressure at intervals of six hours. These records, verified by the oath of a responsible officer or employee of the defendant, shall be reported to the Clerk of this Court immediately after the end of each calendar month.

4. That it shall deposit with the Clerk of this Court an additional sum of $125.40 to cover expenses and compensation of Inspector.

5. That the Clerk shall pay to Dr. John T. McGill, Inspector heretofore appointed, the sum of $3,375.40—$3,000 being compensation for services, and $375.40 to meet expenses incurred in excess of payments heretofore made to him.

6. The costs of the proceedings in the cause from February 24, 1914, to this date will be charged to defendant The Ducktown Sulphur, Copper and Iron Company, Limited; costs accruing prior to February 24, 1914, will be divided equally between The Tennessee Copper Company and The Ducktown Sulphur, Copper and Iron Company, Limited.

7. The cause will be retained on the docket until further order of the court.

April 3, 1916.

STATE OF NORTH CAROLINA *v.* STATE OF TENNESSEE.

IN EQUITY.

No. 4, Original. Decree, entered April 3, 1916.

Decree embodying report of Comissioners and establishing Slick Rock Basin and Tellico Basin sections of the boundary between the States of North Carolina and Tennessee established in accordance with decision of this court, 235 U. S. 1.

THIS cause coming on to be heard on the motion of counsel for the complainant, concurred in by the counsel for the defendant, to confirm the report of the Commissioners heretofore appointed by this court to ascertain, retrace, remark, and re-establish the real, certain, and true boundary line between the States of North Carolina and Tennessee between certain points, mentioned in said report, which said report is in the words and figures following to wit:

"Pursuant to a decree of the Supreme Court of the United States, issued at the October Term, 1914, which appointed D. B. Burns of Asheville, N. C., W. D. Hale of Maryville, Tenn., and Addison, Ky., and Joseph Hyde Pratt of Chapel Hill, N. C., Commissioners to permanently mark and set monuments on the line in dispute in said controversy between said States, and which set out in detail the duties of said Commissioners, we, the said D. B. Burns, W. D. Hale and Joseph Hyde Pratt, Commissioners, do herewith respectfully submit our report.

"We have, as ordered, reproduced on the accompanying map, No. 1, the State Line from Tree No. 1—the same being the 59th mile-tree marked by the Commissioners in 1821—southwestwardly to the point where the dispute began, which point is 15 feet south 32 46′ west from Tree No. 29—the hemlock fore and aft tree marked by the Commissioners in 1821—just north of Little Tennessee River. The description of said reproduced line is as follows, viz.:

"Beginning at the 59th mile tree, a large red oak or mountain oak, marked on the southeast side $\frac{59}{M}$. This tree stands in the Rich Gap of the Smoky Mountain, and 260 feet North 30 47′ East from the lowest part of said gap, and runs with the meanders of the mountain South 25 50′ 00″ West 190 feet to a stake,
thence South 43 55′ 35″ West 472 feet to a stake,
thence South 60 58′ 55″ West 212 feet to a stake,
thence South 83 18′ 42″ West 344 feet to a stake,
thence South 82 32′ 00″ West 235 feet to a stake,
thence South 55 05′ 47″ West 561 feet to a stake,
thence South 32 31′ 35″ West 545 feet to a stake,
thence South 51 24′ 25″ West 424 feet to a stake,
thence South 43 58′ 57″ West 284 feet to a stake,
thence South 40 20′ 30″ West 520 feet to a stake,
thence South 45 52′ 47″ West 332 feet to a stake,
thence South 0 30′ 10″ East 410 feet to a stake,
thence South 6 58′ 06″ East 191 feet to a stake,
thence South 2 26′ 42″ West, passing the Dalton Gap at 567 feet—a very deep gap through which the Old Tellassee Trail passes, 1367.6 feet to a stake,
thence South 65 58′ 00″ West 149 feet to a stake,
thence South 47 06′ 05″ West 516 feet to a stake,
thence South 62 08′ 15″ West 264 feet to a stake,
thence South 74 42′ 15″ West 155 feet to a stake,
thence South 53 02′ 15″ West 579 feet to a stake,
thence South 25 22′ 15″ West 134 feet to a stake,
thence South 15 59′ 15″ West 637 feet to a stake,
thence South 28 52′ 30″ West 783 feet to a stake,
thence South 33 43′ 51″ West 517 feet to a stake,
thence South 0 31′ 51″ East 279.5 feet to a stake,
then South 5 31′ 57″ West, passing a pile of rocks at the supposed location of the 61st mile tree at 423 feet, 463 feet to a stake,
thence South 2 40′ 30″ East 450 feet to a stake,
thence South 17 21′ 33″ West 451 feet to a stake,

thence South 41 01′ 06″ West 93 feet to a stake,
thence South 43 45′ 39″ West 511 feet to a stake,
thence South 17 49′ 27″ West 437 feet to a stake,
thence South 34 00′ 30″ West 246 feet to a stake,
the turnpike road in a deep gap,
thence South 73 30′ 00″ West 380.2 feet to a stake,
thence South 60 43′ 30″ West 125.4 feet to a stake,
thence South 52 18′ 00″ West 1304.4 feet to a stake,
thence North 72 19′ 00″ West 490 feet to a stake,
thence South 57 34′ 00″ West 450 feet to a stake,
thence North 63 18′ 30″ West 365 feet to a stake,
thence North 72 23′ 00′ West, passing the Locust Gap, where the 62d mile tree is said to have stood, at 112 feet, 745 feet to a stake,
thence South 83 42′ 00″ West 539.7 feet to a stake,
thence South 34 25′ 30″ West 198.7 feet to a stake,
thence South 82 52′ 30″ West 531.6 feet to a stake,
thence South 54 14′ 00″ West 370 feet to a stake,
thence North 75 17′ 30″ West 550 feet to a stake,
thence South 76 15′ 30″ West 550 feet to a stake,
thence South 69 28′ 30″ West 200 feet to a stake,
thence South 85 32′ 00″ West 400 feet to a stake,
thence South 71 35′ 00″ West 670 feet to a stake,
thence South 66 21′ 00″ West, passing an 18″ hickory, supposed to be the 63d mile tree, at 344 feet, 500 feet to a stake,
thence South 10 59′ 00″ West 200 feet to a stake,
thence South 63 07′ 00″ West 150 feet to a stake,
thence South 27 44′ 00″ West 450 feet to the top of a high knob,
thence South 51 52′ 00″ West 580 feet to a stake,
thence South 56 03′ 00″ West 260 feet to a stake,
thence South 45 13′ 30″ West 390 feet to a stake,
thence South 65 48′ 30″ West 150 feet to a stake,
thence South 26 22′ 00″ West 220 feet to a stake,
thence South 16 12′ 00″ East 260 feet to a stake,

thence South 52 44′ 30″ West 390 feet to a stake,
thence South 17 48′ 30″ East 590 feet to the top of Lone Pine Knob,
thence North 73 47′ 30″ West 380 feet to a stake,
thence South 76 27′ 30″ West 610 feet to a stake,
thence South 66 20′ 30″ West 450 feet to a stake,
thence South 15 07′ 30″ West 350 feet to a stake,
thence South 59 33′ 30″ West 680 feet to a stake,
thence North 67 51′ 30″ West 470 feet to a stake,
thence South 49 24′ 30″ West, passing a fore and aft hemlock north of Little Tennessee River at 775 feet, 790 feet to where the lines of contention diverge, where we set up a rock 8 inches thick, 12 inches wide, and 18 inches high, and cut on the southeast side of it N. C., on the northwest side TENN., on the northeast side 0+00, and on the southwest side 1915, and cut a X in the top of the rock. This is Monument No. 1. From this point, on the 7th day of August, 1915, we began the survey and marking of the line, marking side line trees with 3 hacks, and fore and aft trees with 2 hacks above a blaze, as follows:

"South 79 11′ 00″ West 135 feet to the river bank, thence down the river on the north bank North 38 27′ 30″ West 285 feet to a stake,
thence North 26 43′ 00″ West 295 feet to a stake,
thence North 22 18′ 30″ West 385 feet to a stake,
thence North 56 42′ 00″ West, passing the stump of tree No. 30 at 259 feet, 619 feet to a stake,
thence North 78 55′ 30″ West 361 feet to a stake,
thence North 78 50′ 00″ West 242 feet to a stake,
thence South 85 11′ 00″ West 372.2 feet to a stake,
thence South 76 29′ 30″ West 276.5 feet to a boulder on the north bank of Little Tennessee River at low water mark, said boulder is 4 feet wide, 10 feet long and 3 feet high, and on it we cut a X, and on the southeast side of the X we cut N. C., 1915, and on the northwest side, TENN., 29+70.7. This is Monument No. 2, thence

South 54 38′ 00″ West 313 feet, crossing the river to a boulder on the south bank of the river and on the west bank of Slick Rock Creek. This boulder is 6 feet wide, 15 feet long and 4 feet high, and on it we cut a X, and on the east side of the X we cut N. C., on the west side TENN., on the north side, 1915, and on the south side 32+83.7. This boulder being 3283.7 feet from Monument No. 1. This is Monument No. 3. From this point we ran up and with the bed of Slick Rock Creek as follows:
South 30′ 13′ 00″ East 209.3 feet to a X on a rock,
thence South 7 24′ 00″ West 494 feet to a X on a rock,
thence South 4 17′ 00″ East 630 feet to a X on a rock,
thence South 33 26′ 00″ West 360.7 feet to a X on a rock,
thence South 60 21′ 00″ West 505.7 feet to a X on a rock,
thence South 02 36′ 30″ East 427.6 feet to a X on a rock,
thence South 21 33′ 30″ East 305.6 feet to a X on a rock, near Ravens Den,
thence North 82 29′ 30″ West 640.4 feet to a X on a rock,
thence South 87 14′ 30″ West 173.5 feet to a X on a rock,
thence South 19 21′ 30″ West 273.3 feet to a X on a rock,
thence South 39 36′ 30″ East 171.0 feet to a X on a rock,
thence South 70 45′ 00″ East 320.3 feet to a X on a rock,
thence South 25 28′ 00″ East 177.9 feet to a X on a rock,
thence South 21 39′ 30″ West 289.0 feet to a X on a rock,
thence North 59 17′ 30″ West 728.4 feet to a X on a rock,
thence South 88 36′ 30″ West 858.0 feet to a X on a rock,
thence North 70 01′ 30″ West 481.6 feet to a X on a rock,
thence South 50 27′ 30″ West 413.0 feet to a X on a rock,
thence South 3 19′ 00″ West 320.0 feet to a X on a rock, at top of lower falls,
thence South 47 27′ 00″ East 464.0 feet to a X on a rock,
thence South 47 15′ 00″ West 113.9 feet to a X on a rock,
thence North 82 52′ 00″ West 531.4 feet to a X on a rock,
thence South 38 42′ 00″ West 172.7 feet to a X on a rock,
thence South 14 09′ 00″ East 534.6 feet to a X on a rock,
thence South 5 09′ 30″ West 798.9 feet to a X on a rock,

thence South 12 20′ 30″ East 257.7 feet to a X on a rock,
thence South 38 02′ 30″ East 291.8 feet to a X on a rock,
thence South 37 20′ 30″ West 236.0 feet to a X on a rock, near the mouth of Slick Rock Gap branch,
thence North 57 33′ 30″ West 485.5 feet to a X on a rock,
thence North 85 41′ 30″ West 432.3 feet to a X on a rock,
thence South 17 13′ 00″ West 432.3 feet to a X on a rock in Slick Rock Creek, near the west bank, and about 30 feet above where the Belding Trail crosses the creek. This rock is 3 feet wide, 5 feet long and 2 feet high. On it we cut a X and cut N. C. on the southeast side, TENN. on the northwest side, 1915 on the southwest side and 156+ 69.8 on the northeast side of the cross. This is Monument No. 4.
Thence South 23 40′ 30″ West 189.9 feet to a X on a rock,
thence North 75 04′ 30″ West 279.3 feet to a X on a rock,
thence North 47 01′ 30″ West 870.5 feet to a X on a rock,
thence North 72 23′ 00″ West 320.5 feet to a stake,
thence South 19 47′ 30″ West, passing the mouth of Little Slick Rock Creek at 85 feet, 685.2 feet to a X on a rock,
thence South 41 03′ 00″ West 465.5 feet to a X on a rock,
thence South 24 22′ 00″ West, passing the mouth of Nichols Cove Branch at 140 feet, 622.8 feet to a X on a rock,
thence South 6 35′ 30″ West 275.5 feet to a X on a rock,
thence South 26 39′ 00″ West 518.0 feet to a X on a rock,
thence South 1 58′ 00″ East 507.5 feet to a X on a rock at the Panther Den,
thence South 58 02′ 00″ West 276.7 feet to a X on a rock,
thence South 39 07′ 30″ West 135.6 feet to a X on a rock,
thence South 82 52′ 30″ West 287.2 feet to a X on a rock,
thence North 56 19′ 30″ West 335.0 feet to a X on a rock,
thence North 52 35′ 30″ West 304.0 feet to a X on a rock,
thence South 84 13′ 30″ West 281.8 feet to a X on a rock,
thence South 43 16′ 30″ West 254.8 feet to a X on a rock,
thence South 9 07′ 00″ East 154.4 feet to a X on a rock,

thence South 36 44′ 00″ East 179.6 feet to a X on a rock,
thence South 14 15′ 00″ West 173.4 feet to a X on a rock,
thence North 86 45′ 30″ West 322.0 feet to a X on a rock,
thence North 71 16′ 00″ West 251.4 feet to a X on a rock,
thence North 17 05′ 30″ West 405.2 feet to a X on a rock,
thence North 68 35′ 00″ West 329.5 feet to a X on a rock,
thence South 43 09′ 00″ West 207.3 feet to a X on a rock,
thence South 23 56′ 30″ West 369.9 feet to a X on a rock,
thence South 44 30′ 30″ West 82.0 feet to a X on a rock,
thence South 4 47′ 00″ West 425.1 feet to a X on a rock,
thence South 8 51′ 00″ East 129.6 feet to a X on a rock,
thence South 53 26′ 00″ West 599.4 feet to a X on a rock,
thence South 2 30′ 00″ East 254.6 feet to a X on a rock,
thence South 16 07′ 30″ East 168.6 feet to a X on a rock,
thence South 35 12′ 00″ West 370.0 feet to a X on a rock,
thence North 67 59′ 30″ West 393.4 feet to a X on a rock at the mouth of a small branch,
thence South 14 36′ 30″ West 494.0 feet to a X on a rock,
thence South 70 54′ 00″ West 160.5 feet to a X on a rock,
thence North 66 12′ 00″ West 561.2 feet to a X on a rock,
thence South 68 50′ 00″ West 197.3 feet to a X on a rock,
thence South 18 18′ 30″ West 350.1 feet to a X on a rock,
thence South 45 16′ 30″ East 241.9 feet to a X on a rock,
thence South 50 11′ 30″ East 281.8 feet to a X on a rock,
thence South 43 40′ 30″ West 316.2 feet to a X on a rock,
thence South 11 19′ 30″ West 238.6 feet to a stake,
thence North 83 33′ 30″ East 314.4 feet to a X on a rock,
thence South 0 44′ 00″ East 193.8 feet to a X on a rock at the mouth of a small branch,
thence South 34 02′ 30″ West 240.0 feet to a X on a rock,
thence South 11 40′ 00″ East 206.7 feet to a X on a rock,
thence South 40 51′ 00″ West 539.3 feet to a X on a rock,
thence South 10 18′ 30″ East, passing the foot of falls at 198 feet, 247.6 feet to a X on a rock,
thence South 73 41′ 00″ East 134.2 feet to a X on a rock in the falls,

thence South 12 37′ 00″ West 262.6 feet to a X on a rock in the falls,
thence South 11 28′ 30″ East, passing the top of falls at 20 feet, 224.2 feet to a X on a rock,
thence South 23 21′ 30″ West 578.6 feet to a X on a rock,
thence South 48 36′ 30″ West 428.6 feet to a X on a rock,
thence South 10 43′ 30″ East 217.3 feet to a large boulder on the west bank of Slick Rock Creek, near the mouth of Big Stack Gap Branch, and at the point of a ridge leading to the Big Fodderstack Mountain, and near Tree No. 46. This boulder is 6 feet wide, 10 feet long and 5 feet high. On it we cut a X, and on the southeast side of the X we cut N. C., on the northwest side TENN., on the southwest side 1915, and on the northeast side 335+24.9, it being 33,524.9 feet from Monument No. 1. This is Monument No. 5.
Thence up said ridge leading to the Big Fodderstack Mountain South 2 45′ 00″ West 148.6 feet to a stake,
thence South 26 58′ 30″ West 751.1 feet to a stake,
thence North 72 59′ 00″ West 468.9 feet to a stake,
thence South 72 41′ 00″ West 532.8 feet to a stake,
thence South 35 01′ 30″ West 156.7 feet to a stake,
thence South 13 04′ 00″ West 487.0 feet to a stake,
thence South 52 34′ 00″ West 866.6 feet to a stake,
thence South 14 01′ 00″ West 51.4 feet to a stake,
thence South 45 19′ 00″ West 127.7 feet to a stake,
thence South 62 42′ 30″ West 526.8 feet to a stake,
thence South 30 39′ 00″ West 181.8 feet to a stake,
thence South 29 50′ 30″ West 337.4 feet to a stake,
thence South 62 54′ 30″ West 358.3 feet to a stake,
thence South 9 05′ 30″ West 177.0 feet to a stake,
thence South 37 07′ 30″ West 164.0 feet to a stake,
thence South 26 04′ 30″ West 302.7 feet to a stake,
thence South 29 15′ 00″ West 335.0 feet to a stake,
thence South 42 23′ 00″ West 104.0 feet to a stake,
thence South 58 23′ 00″ West 814.0 feet to a stake,

thence South 78 59′ 00″ West 510.6 feet to a stake,
thence North 73 26′ 00″ West 559.6 feet to a stake,
thence North 53 08′ 00″ West 261.1 feet to a stake,
thence South 86 21′ 00″ West 279.8 feet to a stake,
thence South 75 19′ 00″ West 147.0 feet to a stake,
thence North 86 57′ 00″ West 207.4 feet to a stake,
thence South 60 01′ 00″ West 342.8 feet to the top of the Big Fodderstack Mountain, where we set Monument No. 6, a stone 5 inches thick, 14 inches wide and 18 inches high, and on it we cut on the southeast side N. C., 427+ 25.0, D. B. B., W. D. H., J. H. P., on the northwest side TENN., 1915, and a X in the top. This stone stands 42,725 feet from Monument No. 1. Thence along Big Fodderstack Mountain with its meanders and with the lines of D. B. Burn's former survey South 14 29′ 30″ East 138.1 feet to a stake,
thence South 8 53′ 30″ East 541.4 feet to a stake,
thence South 28 15′ 30″ East, passing Harrison Gap at 1196 feet, 1323.2 feet to a stake,
thence South 11 12′ 30″ West 810.8 feet to a stake,
thence South 34 50′ 00″ East 510.7 feet to a stake,
thence South 29 38′ 00″ East 167.8 feet to a stake,
thence South 23 20′ 00″ East 1063.0 feet to a stake,
thence South 41 18′ 30″ East 311.1 feet to a stake on the Rock Stack,
thence South 60 38′ 30″ East 354.6 feet to a stake,
thence South 83 22′ 00″ East 453.3 feet to a stake,
thence South 60 02′ 00″ East 489.4 feet to a stake,
thence South 37 57′ 30″ East 206.9 feet to a stake, on the top of a very high knob,
thence South 10 09′ 30″ East 574.5 feet to a stake,
thence South 9 05′ 30″ East 586.2 feet to a stake,
thence South 21 34′ 00″ East 195.3 feet to a stake,
thence South 2 41′ 00″ East 444.7 feet to Monument No. 7—a stone 5 inches thick, 10 inches wide and 18 inches high. We cut a X in the top of it. On the east side we

inscribed N. C., 1915, and on the west side TENN., 508+96. This stone stands in the Glen Gap, and is 50,896 feet from Monument No. 1; continuing on same course 228.9 feet to a stake,
thence South 47 50′ 30″ East 334.7 feet to a stake,
thence North 82 05′ 30″ East 150.7 feet to a stake,
thence North 80 40′ 30″ East 252.8 feet to a stake,
thence South 67 14′ 30″ East 651.0 feet to a stake,
thence South 40 33′ 00″ East 133.9 feet to a stake on the Chestnut Knob,
thence South 5 27′ 00″ East 301.1 feet to a stake,
thence South 20 29′ 00″ West 433.5 feet to a stake,
thence South 33 45′ 30″ West 352.4 feet to a stake,
thence South 33 52′ 00″ West 450.5 feet to a stake,
thence South 26 05′ 00″ West 205.2 feet to a stake,
thence South 6 21′ 30″ West 60.7 feet to a stake,
thence South 17 37′ 30″ West 515.8 feet to a stake,
thence South 13 56′ 00″ West 139.0 feet to a stake,
thence South 21 45′ 00″ East 325.2 feet to a stake,
thence South 42 15′ 00″ East 324.9 feet to a stake,
thence South 40 47′ 30″ East 327.4 feet to a stake in the Denton Gap,
thence South 7 15′ 30″ East 335.1 feet to a stake,
thence South 22 31′ 30″ West 176.7 feet to a stake,
thence South 14 59′ 30″ East 563.9 feet to a stake,
thence South 14 33′ 00″ East 355.5 feet to a stake in the Cherry Log Gap,
thence South 4 38′ 00″ East 487.5 feet to a stake,
thence South 0 16′ 00″ East 71.3 feet to a stake,
thence South 4 01′ 30″ East 89.4 feet to a stake,
thence South 16 01′ 00″ West 210.3 feet to a stake,
thence South 0 30′ 00″ West 326.6 feet to a stake,
thence South 5 30′ 30″ West 819.4 feet to a stake,
thence South 40 32′ 00″ East 262.5 feet to a stake,
thence South 41 19′ 00″ East 343.9 feet to a stake,
thence South 29 48′ 00″ West 14.9 feet to a large boulder

on the Stratton Bald Mountain, at its junction with Big Fodderstack Mountain, and at the point where the two lines of contention join. This boulder is Monument No. 8, and is 3 feet wide at its base, 10 feet long and 3 feet high. On the top of this boulder we cut a X, on the southeast side N. C., 601+40.7, and on the northwest side TENN., 1915. This boulder stands 60,140.7 feet from Monument 1. Thence along the top of the main ridge that divides the waters of Citico Creek, North Fork of Tellico River and Sycamore Creek from the waters of Santeelah and Snowbird creeks, as follows:

thence South 73 34′ 00″ West 194.0 feet to a stake,
thence South 50 34′ 30″ West 393.6 feet to a stake,
thence South 52 49′ 30″ West 84.0 feet to a stake,
thence South 50 55′ 30″ West 178.0 feet to a stake,
thence South 31 43′ 30″ West 301.0 feet to a stake,
thence South 32 02′ 30″ West 1575.8 feet to a stake,
thence South 48 45′ 30″ West 631.2 feet to a stake,
thence South 24 54′ 30″ West 113.5 feet to a stake,
thence South 25 23′ 30″ West 581.5 feet to a stake,
thence South 34 27′ 30″ West 502.0 feet to a stake,
thence South 31 55′ 30″ West 143.2 feet to a stake,
thence South 35 18′ 00″ West 364.8 feet to a stake,
thence South 35 39′ 00″ West 623.6 feet to a stake,
thence South 8 58′ 30″ West 480.4 feet to a stake,
thence South 40 20′ 00″ West 523.0 feet to a stake,
thence South 59 35′ 00″ West 768.0 feet to a stake,
thence South 12 45′ 00″ West, crossing the Tellico Trail at 297 feet, on top of the Strawberry Knob, 639.3 feet to a stake,
thence South 71 42′ 30″ West 591.7 feet to a stake,
thence South 86 36′ 30″ West 209.3 feet to a stake,
thence South 68 49′ 30″ West 477.7 feet to a stake,
thence North 71 42′ 00″ West 332.5 feet to a stake,
thence South 79 01′ 00″ West 362.8 feet to a stake,
thence South 70 57′ 00″ West 412.4 feet to a stake,

thence South 73 39′ 00″ West 383.9 feet to a stake at Rock Stop Bear Stand,
thence South 28 26′ 00″ West 389.1 feet to a stake,
thence South 45 42′ 00″ West 281.3 feet to a stake,
thence South 72 20′ 30″ West 490.3 feet to a stake,
thence South 73 31′ 30″ West 352.7 feet to a stake,
thence South 72 44′ 30″ West 227.3 feet to a stake,
thence South 25 09′ 00″ West 208.0 feet to a stake,
thence South 26 31′ 00″ West 598.7 feet to a stake in Beech Gap,
thence South 11 01′ 00″ West 269.0 feet to a stake,
thence South 50 51′ 30″ East 403.0 feet to a stake,
thence South 35 55′ 30″ East 161.0 feet to a stake,
thence South 36 36′ 30″ East 369.0 feet to a stake,
thence South 32 28′ 30″ East 1272.4 feet to a stake,
thence South 36 24′ 00″ West 142.9 feet to a stake,
thence South 37 42′ 30″ West 391.9 feet to a stake,
thence South 47 53′ 00″ West 292.8 feet to a stake,
thence South 12 09′ 30″ West 668.7 feet to a stake,
thence South 0 58′ 00″ West 631.3 feet to a stake,
thence South 76 29′ 00″ East 586.4 feet to a stake,
thence North 75 12′ 00″ East 187.6 feet to a stake,
thence South 81 49′ 00″ East, 431.4 feet to a stake,
thence South 66 09′ 30″ East, passing Stratton's Grave on the crest of the mountain at 148 feet, 245.4 feet to a stake,
thence South 25 50′ 30″ East, passing the John Meadows Gap at 168 feet, 688.4 feet to a stake,
thence South 19 13′ 00″ East 283.7 feet to a stake,
thence South 22 35′ 30″ East 490.5 feet to a stake,
thence South 25 04′ 30″ East 144.0 feet to a stake,
thence South 18 23′ 30″ West 785.0 feet to a stake on the top of John Knob,
thence South 39 58′ 00″ West 148.4 feet to a stake,
thence South 38 22′ 00″ West 147.6 feet to a stake,
thence South 48 28′ 00″ West 434.0 feet to a stake,

thence South 15 49′ 00″ West 746.6 feet to a stake,
thence South 5 26′ 00″ West 341.0 feet to a stake,
thence South 2 47′ 00″ East 583.4 feet to a stake,
thence South 17 49′ 00″ West 371.0 feet to a stake,
thence South 20 38′ 00″ West 290.0 feet to a stake,
thence South 19 42′ 30″ West 384.6 feet to a stake,
thence South 20 37′ 30″ West 317.9 feet to a stake,
thence South 12 47′ 00″ East 312.9 feet to a stake,
thence South 25 10′ 00″ West 515.6 feet to a stake,
thence South 17 15′ 00″ West 248.3 feet to a stake,
thence South 22 53′ 00″ West 284.5 feet to a stake,
thence South 18 25′ 00″ West 514.2 feet to a stake,
thence South 1 00′ 00″ East 673.6 feet to the top of Little Haw Knob,
thence South 11 31′ 30″ West 370.2 feet to a stake,
thence South 15 43′ 30″ East 502.2 feet to a stake,
thence South 30 35′ 30″ East passing McClelland's mile stone marked N. C. 78 at 303 feet, 346.8 feet to a stake,
thence South 54 38′ 30″ East 243.6 feet to a stake,
thence South 67 13′ 30″ East 344.6 feet to a stake,
thence South 79 08′ 30″ East 593.5 feet to a stake,
thence South 83 36′ 00″ East 355.5 feet to a stake,
thence South 86 36′ 30″ East 392.5 feet to a stake,
thence South 62 04′ 30″ East 735.5 feet to a stake, on the top of Haw Knob,
thence South 6 04′ 30″ East 362.7 feet to a stake,
thence South 1 04′ 30″ East 193.1 feet to a stake,
thence South 4 36′ 30″ West 321.7 feet to a stake,
thence South 9 11′ 30″ East 325.5 feet to a stake,
thence South 32 29′ 30″ East 121.0 feet to a stake,
thence South 49 34′ 00″ East 478.3 feet to a stake,
thence South 37 48′ 00″ East 343.1 feet to a stake,
thence South 24 19′ 00″ East 713.6 feet to a stake,
thence South 66 03′ 30″ East 205.3 feet to a stake,
thence South 57 47′ 30″ East 283.7 feet to a stake,
thence South 71 16′ 00″ East 223.8 feet to a stake,

thence South 5 23′ 00″ West 111.2 feet to a stake,
thence South 30 09′ 00″ West 395.0 feet to a stake,
thence South 40 45′ 00″ West 607.0 feet to a stake,
thence South 21 14′ 00″ West 225.0 feet to a stake,
thence South 6 33′ 00″ West 170.0 feet to a stake, at northwest end of Laurel Top,
thence South 21 25′ 30″ East 465.4 feet to a stake, at southeast end of Laurel Top,
thence South 36 34′ 00″ West 296.4 feet to a stake,
thence South 45 12′ 30″ West 1101.9 feet to a stake,
thence South 44 59′ 30″ West 178.3 feet to a stake,
thence South 65 52′ 30″ West 140.5 feet to a stake, on the top of Lebo Knob,
thence South 46 01′ 30″ West 106.8 feet to a stake,
thence South 60 33′ 00″ West 450.3 feet to a Rock Ledge projecting out of the ground 2 feet high, 5 feet long and 1 foot thick and marked

I
C. Co. I G. Co.
I

This is the place known as the County Corners and we used this Rock for Monument No. 9, and on the top of it we cut a X, on the southeast face N. C., 1915, and on the northwest face TENN. 1003+90.0. This stone is 100,390 feet from Monument No. 1 and is the point at which the lines of contention diverge; thence down the State Ridge as it meanders South 51 21′ 00″ West passing the Hog Jaw Gap at 535 feet, 831.1 feet to a stake,
thence South 55 29′ 30″ West 311.4 feet to a stake,
thence South 42 13′ 00″ West 244.0 feet to a stake,
thence South 72 04′ 00″ West 337.5 feet to a stake,
thence North 81 54′ 00″ West 47.7 feet to a stake, top of Grassy Top,
thence South 60 51′ 00″ West 71.7 feet to the junction of the State Ridge and Rough Ridge, known as Little Junction,
thence South 66 21′ 00″ West 137.0 feet to a stake,

thence South 24 14′ 30″ West 271.1 feet to a stake,
thence South 21 30′ 00″ West 351.4 feet to a stake,
thence South 30 51′ 30″ West 412.4 feet to a stake,
thence South 23 40′ 00″ West 236.2 feet to a stake,
thence South 34 11′ 30″ West 676.9 feet to a stake,
thence South 14 08′ 00″ West 1426.2 feet to a stake,
thence South 40 10′ 30″ West 528.9 feet to a stake,
thence South 51 27′ 30″ West 602.6 feet to a stake,
thence South 28 34′ 30″ West 202.6 feet to a stake,
thence South 56 01′ 00″ West 498.7 feet to a stake,
thence South 45 39′ 00″ West 642.2 feet to a stake,
thence South 15 10′ 00″ West 370.1 feet to a stake,
thence South 63 56′ 30″ West 260.3 feet to a stake,
thence North 89 04′ 30″ West 257.1 feet to a stake,
thence South 58 56′ 30″ West 241.5 feet to a stake,
thence South 83 58′ 30″ West 431.8 feet to a stake,
thence South 38 50′ 30″ West 700.1 feet to a stake,
thence South 32 17′ 00″ West 331.7 feet to a stake,
thence South 10 32′ 00″ East 399.1 feet to a stake,
thence South 37 30′ 00″ West 179.5 feet to a stake,
thence South 58 29′ 00″ West 358.5 feet to Red Log Gap, where we set a Stone 5 inches thick, 7 inches wide and 18 inches high, and on top of it we cut a X, on the southeast side N. C., 1915, on the northwest side TENN., and on the northeast side 1122+00. This Stone stands 112,200 feet from Monument No. 1, and is Monument No. 10.
Thence South 57 29′ 00″ West 140.6 feet to a stake,
thence South 46 20′ 00″ West 453.6 feet to a stake,
thence South 83 13′ 00″ West 542.9 feet to a stake,
thence South 52 58′ 30″ West 561.6 feet to a stake,
thence North 81 00′ 30″ West 394.8 feet to a stake,
thence South 70 42′ 00″ West 547.2 feet to a stake,
thence South 83 55′ 30″ West 414.5 feet to a stake,
thence South 70 39′ 00″ West 406.1 feet to McClelland's mile rock, a large boulder over one end of which a tree has grown; said rock is marked N. C.;

thence South 57 47′ 00″ West 498.5 feet to a stake,
thence South 61 51′ 30″ West 334.7 feet to a stake,
thence South 59 58′ 00″ West 361.9 feet to a stake,
thence South 77 15′ 30″ West 243.5 feet to a stake,
thence South 65 56′ 00″ West 384.4 feet to a stake,
thence South 88 22′ 00″ West 132.0 feet to a stake,
thence South 56 16′ 00″ West 241.6 feet to a stake,
thence North 63 43′ 30″ West 133.6 feet to a stake,
thence South 56 05′ 00″ West 474.4 feet to a stake,
thence North 81 30′ 30″ West 303.0 feet to a stake,
thence South 79 04′ 30″ West 501.0 feet to a stake,
thence South 57 56′ 00″ West 615.6 feet to a stake,
thence South 79 41′ 30″ West 411.1 feet to a stake,
thence South 69 40′ 00″ West 153.7 feet to a stake,
thence South 51 32′ 30″ West 378.4 feet to a stake,
thence South 72 12′ 00″ West 232.4 feet to Monument No. 11—a Stone 6 inches thick, 14 inches wide and 18 inches high. On the top of it we cut a X; on the southeast side N. C.; on the southwest side 1915; on the northwest side TENN.; on the northeast side 1210+69.0.

"This Stone stands 121,069 feet from Monument No. 1 and 61 feet from the northeast bank of Tellico River, thence crossing Tellico River South 50 44′ 30″ West 138.0 feet to a stake,
thence South 36 48′ 30″ West 107.7 feet to a stake,
thence South 43 47′ 30″ West 81.9 feet to a stake,
thence South 30 17′ 30″ West 120.1 feet to a stake,
thence South 35 52′ 30″ West 202.1 feet to a stake,
thence South 48 47′ 00″ West passing the 86 mile tree, an 18 inch holly marked 86 M at 95 feet, 131.7 feet to a stake,
thence South 35 26′ 00″ West 396.4 feet to a stake,
thence South 17 33′ 30″ West 147.4 feet to a stake,
thence South 34 03′ 30″ East 439.7 feet to a stake,
thence South 10 32′ 00″ East 242.5 feet to a stake,
thence South 46 26′ 00″ West 415.3 feet to a stake,
thence South 87 32′ 00″ West 286.3 feet to a stake,

thence South 70 18′ 00″ West 354.0 feet to a stake,
thence South 35 37′ 30″ West 431.3 feet to a stake,
thence South 58 28′ 00″ West 472.4 feet to a stake,
thence South 5 00′ 30″ West 293.4 feet to a stake,
thence South 75 17′ 30″ West 584.3 feet to a stake,
thence South 24 37′ 30″ West 357.1 feet to a stake,
thence South 74 21′ 30″ West 309.8 feet to a stake,
thence South 21 48′ 30″ West 445.6 feet to a stake,
thence South 39 11′ 00″ West 460.3 feet to a stake,
thence South 64 02′ 00″ West 261.5 feet to the top of Jenks Knob at the point where the two lines of contention join. Here we set up Monument No. 12—a Stone 4 inches thick, 8 inches wide and 18 inches high, on top of which we cut a X; on the southeast side N. C.; on the southwest side 1915; on the northwest side TENN., and on the northeast side 1277+48.2. This stone stands 127,748.2 feet from Monument No. 1, and at the end of the contention in this cause.

"Signed this the 20th day of October, 1915.

"(Signed) D. B. Burns.
"(Signed) W. D. Hale.
"(Signed) Joseph Hyde Pratt,
Chairman."

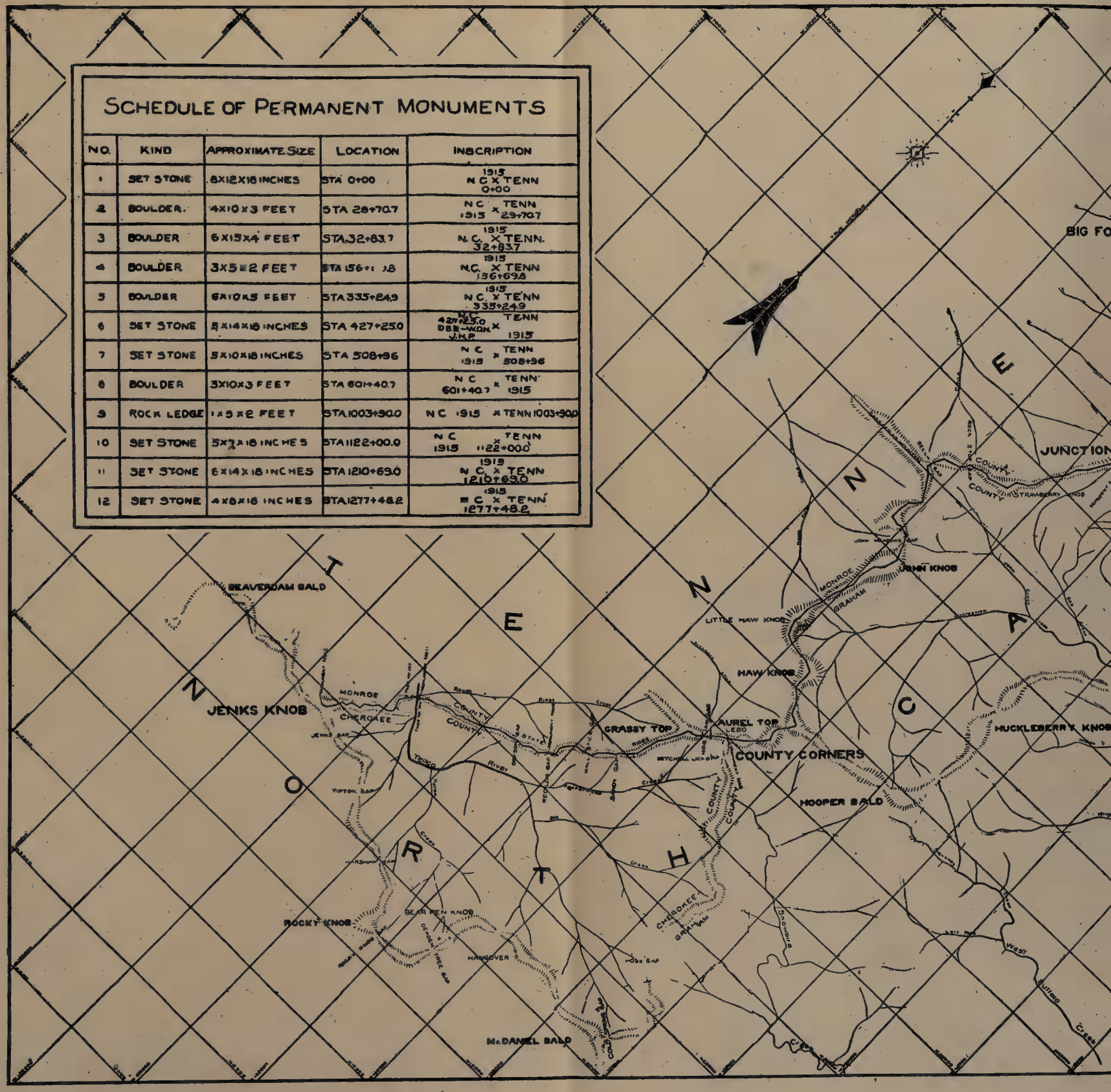
On consideration whereof,

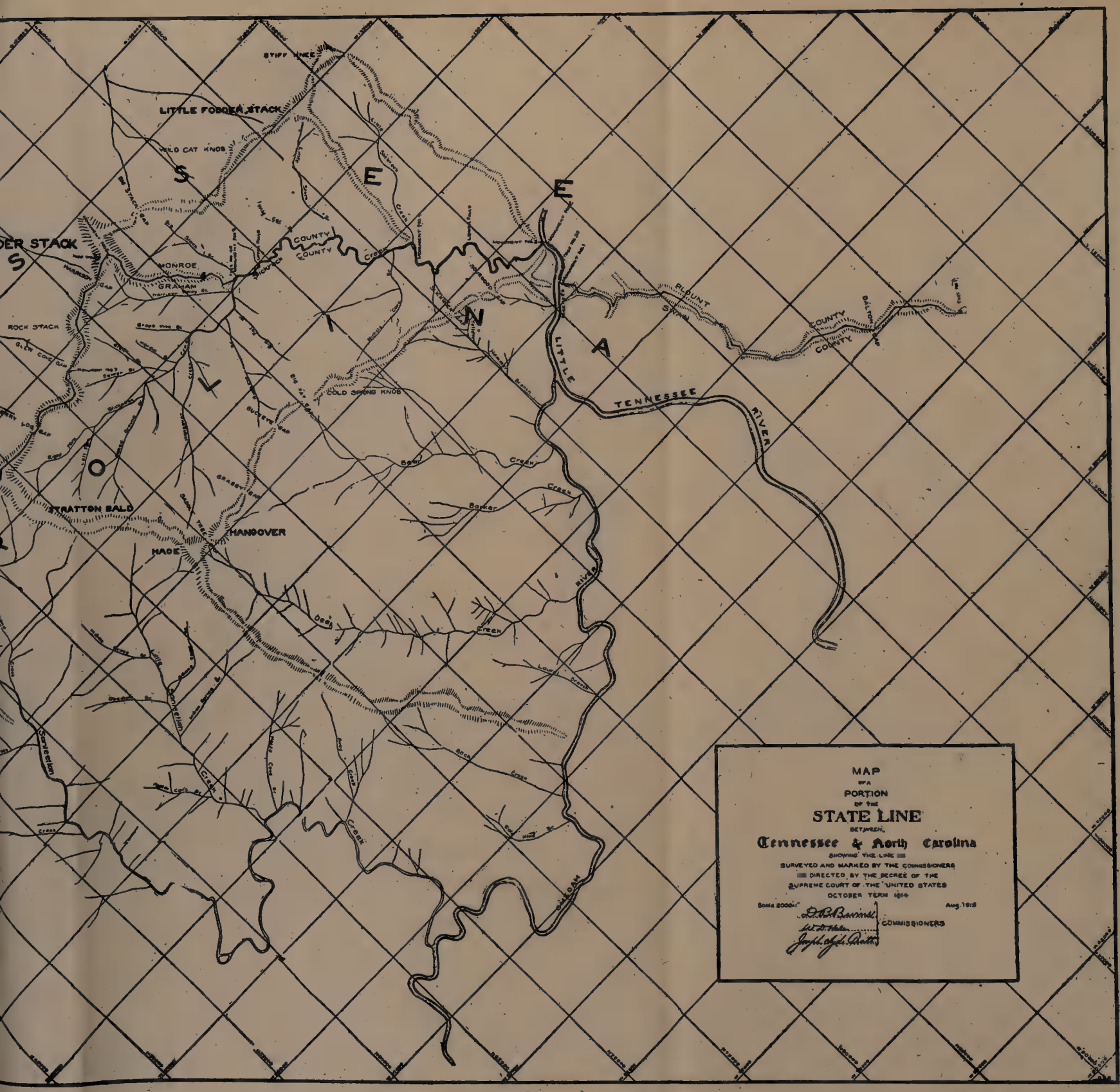
It is now here ordered, adjudged, and decreed by this Court that the real, certain, and true boundary line between the States of North Carolina and Tennessee between said certain points is as delineated in the said report and on the map [1] attached thereto and made a part hereof.

It is further ordered, adjudged, and decreed that each party pay one-half of the costs in this case.

SCHEDULE OF PERMANENT MONUMENTS

NO.	KIND	APPROXIMATE SIZE	LOCATION	INSCRIPTION
1	SET STONE	8X12X18 INCHES	STA 0+00	1915 N C X TENN 0+00
2	BOULDER.	4X10X3 FEET	STA 29+70.7	N C 1915 X TENN 29+70.7
3	BOULDER	6X15X4 FEET	STA 32+83.7	1915 N.C. X TENN. 32+83.7
4	BOULDER	3X5X2 FEET	STA 156+[illegible]8	1915 N.C. X TENN 156+69.8
5	BOULDER	6X10X5 FEET	STA 335+24.9	1915 N C. X TENN 335+24.9
6	SET STONE	5X14X18 INCHES	STA 427+25.0	N.C. 427+25.0 DBB-WDH. J.H.P. X TENN 1915
7	SET STONE	5X10X18 INCHES	STA 508+96	N C 1915 X TENN 508+96
8	BOULDER	3X10X3 FEET	STA 601+40.7	N C 601+40.7 X TENN 1915
9	ROCK LEDGE	1X5X2 FEET	STA 1003+90.0	N C 1915 X TENN 1003+90.0
10	SET STONE	5X7X18 INCHES	STA 1122+00.0	N C 1915 X TENN 1122+00.0
11	SET STONE	6X14X18 INCHES	STA 1210+69.0	1915 N C. X TENN 1210+69.0
12	SET STONE	4X8X18 INCHES	STA 1277+48.2	1915 N C X TENN 1277+48.2




MAP
OF A
PORTION
OF THE
STATE LINE
BETWEEN
Tennessee & North Carolina
SHOWING THE LINE
SURVEYED AND MARKED BY THE COMMISSIONERS
DIRECTED BY THE DECREE OF THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1914
Scale 2000-1"
Aug. 1915
COMMISSIONERS
LITTLE FODDER STACK
WILD CAT KNOB
STIFF KNEE
MONROE
GRAHAM
ROCK STACK
COLD SPRING KNOB
STRATTON BALD
HANGOVER
HAGE
LITTLE TENNESSEE RIVER
PLOUNT
SWAN
COUNTY
COUNTY
DALTON GAP
Creek
Barker
Deer
Sanneetian
Creek
Rock
Creek
Lowell Branch
Little
Sanneetian
Creek
Creek
S E E
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SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

It is Ordered by the Court that §§ 2 and 9 of Rule 10 of this Court be, and the same are hereby, amended so as to read as follows:

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the Clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the Clerk to report that fact to the Court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the Clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the Clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the Clerk shall print those parts only; and the Court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the

circumstances may appear to the Court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper.

The fees of the Clerk under Rule 24, § 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

These amendments shall go into effect May 1, 1916. (Promulgated March 20, 1916.)

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Claim for damages for breach of executory contract held provable for such, covering entire life of contract, notwithstanding party proving had right to cancel contract on stated notice, that provision not being reciprocal. *Id.*
Under § 5, when partnership insolvent and each individual partner also insolvent, and only fund for distribution is produced by individual estate of one member, individual creditors of that member are entitled to priority in distribution of fund. *Farmers' & Mechanics' Nat. Bank* v. *Ridge Avenue Bank*..... 498

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Congress has power to regulate overt act of putting letter into post office, and may prohibit, under penalty, such an act when done in furtherance of a scheme, whether it can forbid scheme or not. *Id.*

Intent of: An act of Congress which leaves subject with which Congress has power to deal unprovided for does not necessarily take matters within unprovided area out of any possible state action. *Innes* v. *Tobin*..... 127

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Nothing in Constitution prevents taxation of membership in exchange restricted in use. *Rogers* v. *Hennepin County*.... 184

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Pennsylvania law of 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of Federal government officials by surety companies under act of 1894, unconstitutional as interference with powers of government. *Fidelity & Deposit Co.* v. *Pennsylvania*..... 319

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While offer by State, without particular person designated, and its acceptance, may constitute contract protected by Con-

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stitution, the offer and acceptance must have characteristics of bargain and be conventional counterparts. *Banning Co.* v. *California* 142

Withdrawal from sale of lands by State before any right consummated not an impairment of contract. *Id.*

Although California statute of 1863 gave private parties right to acquire tide lands, abrogation of right by later statutes and constitution not unconstitutional under contract clause as to one who had not paid any part of purchase price prior thereto. *Id.*

Creditor of State cannot assert rights against withdrawal by state officers of funds of State under their control in regard to which State had not consented to be sued; and held, that such withdrawal did not amount to impairment of contract obligations. *Carolina Glass Co.* v. *South Carolina* 305

Florida statute of 1913, imposing special license taxes on merchants using profit sharing coupons and trading stamps, is not unconstitutional as impairing obligation of contracts, as it must be construed as having prospective operation. *Rast* v. *Van Deman & Lewis* 342

If business subject to regulation by State and imposition of privilege taxes, contracts made in its conduct are also subject to such regulation. *Id.*

Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, not unconstitutional as impairing obligation of contracts. *Tanner* v. *Little* 369

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Ordinance requiring railway company to do certain paving held not an impairment of obligation of charter contract. *Southern Wisconsin Ry.* v. *Madison* 457

Imposition of inheritance tax on property passing by deed in trust, by State of donor's residence, held not unconstitutional as impairing obligation of contract because State where property situated had imposed inheritance tax thereon. *Bullen* v. *Wisconsin* 625

V. **Commerce Clause.**

Regulations of retail sales within State held not to amount to attempt to control interstate commerce. *Rast* v. *Van Deman & Lewis* 342

Regulation of use of profit sharing coupons and trading stamps in connection with retail sales to individual purchasers and consumers and not designed to be used by manufacturer

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from another State to State of distribution, does not interfere with or burden interstate commerce. *Id.*

Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, not unconstitutional as interfering with or burdening interstate commerce. *Tanner* v. *Little*..... 369

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Tax imposed by c. 135, Kansas Laws, 1913, on privilege of being corporation, is not, as to domestic corporation engaged in both interstate and intrastate commerce, invalid as violation of commerce clause. *Kansas City Ry.* v. *Kansas*..... 227

Arkansas statute requiring full switching crews on railroads over one hundred miles in length is not unconstitutional as interfering with or burdening interstate commerce. *St. Louis, I. M. & S. Ry.* v. *Arkansas*..... 518

Net weight lard statute of North Dakota is not, as to packages sent into State from other States and afterwards sold to consumers at retail, an interference with or burden on interstate commerce. *Armour & Co.* v. *North Dakota*..... 510

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Amendment is not a limitation upon taxing power conferred upon Congress. *Brushaber* v. *Union Pacific R. R. Co*..... 1

Requiring appeal to Commissioner of Internal Revenue after payment of taxes and giving right to sue only after his refusal to refund does not violate due process of law. *Dodge* v. *Osborn*..... 118

Income Tax Act is not unconstitutional under due process provision. *Brushaber* v. *Union Pacific R. R. Co*..... 1

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VII. **Thirteenth Amendment.**

Involuntary servitude covers those forms of compulsory labor akin to African slavery and does not interdict enforcement of duties owed by individuals to State. *Butler* v. *Perry*..... 328

Object of Amendment liberty under protection of effective government and not destructive of latter by depriving it of essential powers theretofore properly exercised. *Id.*

Requirement by State that able-bodied men do reasonable amount of work on public roads near residence does not amount to involuntary servitude under Constitution. *Id.*

VIII. **Fourteenth Amendment.**

1. *Generally:* Amendment was intended to recognize and protect fundamental objects long recognized under common-law system. *Butler* v. *Perry*..... 328

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Statute of Florida requiring able-bodied men to do certain work on public roads within county of residence, not unconstitutional as contrary to due process. *Id.*

Legislature may create taxing districts to meet expense of local improvements without encountering Amendment, unless action palpably arbitrary or plain abuse. *Gast Realty Co.* v. *Schneider Granite Co.* 55

2. *Due Process of Law:* Due process does not prevent State from placing upon bank commissioner duty of closing bank found upon examination to be insolvent without first instituting proceedings and obtaining award. *Title Guaranty Co.* v. *Allen.* 136

State in fixing situs for taxation of memberships in exchange at place where exchange located does not deprive non-resident members of their property without due process. *Rogers* v. *Hennepin County* 184

Tax imposed by c. 135, Kansas Laws, 1913, on privilege of being corporation, is not, as to domestic corporation engaged in both interstate and intrastate commerce invalid as a violation of due process clause. *Kansas City Ry.* v. *Kansas* 227

Where taxing district established by delegated authority it is essential to due process of law that landowners have opportunity to be heard on question of benefits. *Embree* v. *Kansas City Road District* 242

Where statute delegating authority for establishment of taxing district provides for hearing on question of benefits, decision of designated tribunal sufficient, and, unless made fraudulently or in bad faith, due process not denied. *Id.*

Adequate hearing may be had before a delegated tribunal authorized to establish taxing districts for roads and to declare what lands shall be included therein as benefited and due process accorded owners, although particular roads to be improved not designated. *Id.*

A legislative act establishing zones of benefits with graduated ratings for assessments in districts lawfully created, does not deny due process of law where it does not provide for a hearing on this particular feature, unless legislative apportionment so arbitrary and devoid of reasonable basis as to amount to abuse of power. *Id.*

Although no hearing afforded owners of land within taxing district on appraisal of their lands for purpose of apportioning tax, due process not denied if such hearing accorded when tax sought to be enforced. *Id.*

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Missouri laws providing for establishment of road improvement districts not unconstitutional under due process provision. *Id.*

A trunk line has no constitutional right to build up business by acts forbidden by Congress in interest of public welfare; and an order of the Interstate Commerce Commission prescribing maximum rates, otherwise legal, does not deprive line of its property without due process by denying it right to compete for business in that manner. *O'Keefe* v. *United States* 294

A state commission appointed to close up business in which State engaged, held to have had jurisdiction to consider, find and off-set claims of State against one claiming for supplies furnished, and by doing so did not deprive claimant of its property without due process of law. *Carolina Glass Co.* v. *South Carolina* 305

Requirement by State that able-bodied men do reasonable amount of work on public roads near residence does not deprive persons of liberty and property without due process of law. *Butler* v. *Perry* 328

There are many restrictions upon liberty of contract and business that do not amount to deprivation of liberty and property without due process of law. *Rast* v. *Van Deman & Lewis* . 342

Even though statutory tax prohibitory, right to carry on business by using trading stamps and profit sharing coupons is not so protected by Constitution as to render tax a violation of due process of law. *Id.*

Florida statute of 1913, imposing license taxes on merchants using profit sharing coupons and trading stamps does not deprive of due process of law because of severity of its penalties intimidating against testing legality. *Id.*

Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, not unconstitutional as denying due process of law. *Tanner* v. *Little* 369

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Ordinance requiring railway company to do certain paving held not a violation of due process of law. *Southern Wisconsin Ry.* v. *Madison* 457

Net weight lard statute of North Dakota is not unconstitutional as depriving sellers of property without due process of law. *Armour & Co.* v. *North Dakota* 510

Arkansas statute requiring full switching crews on railroads

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over one hundred miles in length is not unconstitutional as depriving such railroads of property without due process of law. *St. Louis, I. M. & S. Ry.* v. *Arkansas* 518

Granting writ of mandamus requiring railroad to comply with order of state commission, which is *prima facie* lawful, pending determination of suit to enjoin enforcement of order, *held*, in view of circumstances and requirement that bond of indemnity be given, not to deprive railroad of due process of law. *Detroit & M. Ry.* v. *Michigan Railroad Comm.* 564

Imposition of inheritance tax on property passing by deed in trust, by State of donor's residence held not unconstitutional as depriving beneficiaries of trust of property without due process of law because State where property situated had imposed inheritance tax thereon. *Bullen* v. *Wisconsin* 625

Income Tax Act does not deny due process of law by reason of classifications therein; nor do provisions for collecting income at source by reason of duties imposed upon corporations without compensation in connection with payment of tax by others. *Brushaber* v. *Union Pacific R. R. Co.* 1

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Want of due process of law does not arise from want of wisdom in Congress in levying taxes and give courts power to overrule action of Congress by declaring it to be unconstitutional. *Brushaber* v. *Union Pacific R. R. Co.* 1

Alabama statute providing for condemnation of property for water power purposes held to be an exercise of power of eminent domain and not unconstitutional as taking property without due process of law. *Mt. Vernon Cotton Co.* v. *Alabama Power Co.* 30

3. *Equal Protection of the Law:* Police statutes, otherwise valid, may, without denying equal protection of the law, contain practical groupings of objects which fairly well present a class, although there may be exceptions in which the evil aimed at is deemed to be not so flagrant. *St. Louis, I. M. & S. Ry.* v. *Arkansas* 518

A distinction in legislation does not deny equal protection of the laws if any state of facts can be conceived that will sustain it. *Rast* v. *Van Deman & Lewis* 342

Classification based on differences between business using and not using profit sharing coupons and trading stamps is not so arbitrary as to deny equal protection of the law. *Id.*

Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, not

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unconstitutional as denying equal protection of law. *Tanner* v. *Little* 369

Pitney v. *Washington* 387

Taxation of memberships in exchanges wherein business transactions conducted for profit not a denial of equal protection because memberships in other associations, not conducting business exchanges and where there are manifest distinctions are not also taxed. *Rogers* v. *Hennepin County* 184

Law establishing taxing district under which there is no reasonable presumption that justice will be done, but under which parties will probably be disproportionately taxed, cannot stand as constitutional against one actually so taxed. *Gast Realty Co.* v. *Schneider Granite Co.* 55

Income Tax Act does not deny equal protection of the law by reason of classification therein. *Brushaber* v. *Union Pacific R. R. Co.* 1

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St. Louis street paving ordinance held to subject property owners to disproportionate taxation and therefore unconstitutional. *Gast Realty Co.* v. *Schneider Granite Co.* 55

Ordinance requiring railway company to do certain paving held not a violation of equal protection of the law. *Southern Wisconsin Ry.* v. *Madison* 457

Arkansas statute requiring full switching crews on railroads over one hundred miles in length is not unconstitutional as denying equal protection of the law. *St. Louis, I. M. & S. Ry.* v. *Arkansas* 518

Net weight lard statute of North Dakota is not unconstitutional as denying equal protection of the law. *Armour & Co.* v. *North Dakota* 510

IX. **Sixteenth Amendment.**

Amendment obviously intended to simplify situation and make clear limitations on taxing power of Congress and not to create radical and destructive changes in constitutional system. *Brushaber* v. *Union Pacific R. R. Co.* 1

By Amendment all income taxes are relieved from rule of apportionment. *Id.*

Income Tax Act is not unconstitutional under Amendment. *Brushaber* v. *Union Pacific R. R. Co.* 1

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There is no authority for taking taxation of mining corporations out of rule established by Amendment; nor is there basis for contention that tax is a direct one on the property itself, beyond the purview of the Amendment, and void for want of apportionment. *Stanton* v. *Baltic Mining Co*..... 103

X. **Cruel and Unusual Punishment.**

Punishment on each of five counts, of five years, periods being concurrent, and fine of $1000 on each of seven counts, held not to be cruel and unusual within prohibition of Constitution. *Badders* v. *United States*..... 391

XI. **Taxation.**

Constitution recognized the two great classes of taxation as direct and indirect and applied rule of apportionment as to former and uniformity as to latter; but by Sixteenth Amendment all income taxes are relieved from rule of apportionment. *Brushaber* v. *Union Pacific R. R. Co*..... 1

Uniformity of taxation required by Constitution is geographical. *Id.*

Fifth Amendment is not a limitation upon taxing power conferred upon Congress. *Id.*

When there are differences between subjects taxed, Congress does not transcend limit of power by taxing them differently. *Id.*

Income Tax Act is not unconstitutional as beyond general taxing power of Congress, or because of discriminations, inequalities or progressive increases on incomes, or method provided for computing income of corporations. *Tyree Realty Co.* v. *Anderson*..... 115

XII. **Eminent Domain.**

Alabama statute providing for condemnation of property for water power purposes held to be an exercise of power of eminent domain and not unconstitutional as taking property without due process of law. *Mt. Vernon Cotton Co.* v. *Alabama Power Co*..... 30

XIII. **Extradition.**

Art. IV of Constitution fully embraces subject of rendition of fugitives from justice between States and confers authority upon Congress to deal with that subject. *Innes* v. *Tobin*..... 127

XIV. **Full Faith and Credit.**

Judgment of Virginia court against garnishee, entered without notice to defendant residing in West Virginia, held to protect garnishee in suit by defendant against him brought in West Virginia. *Baltimore & Ohio R. R.* v. *Hostetter*..... 620

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XV. **Retroactive Laws.**

Income Tax Act is not unconstitutional by reason of retroactive operation. *Brushaber* v. *Union Pacific R. R. Co.*..... 1
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XVI. **Suit Against State.**

A suit against a state commission held to be in effect a suit against State not maintainable in Federal court. *Carolina Glass Co.* v. *South Carolina*..... 305

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A subsequent legislative interpretation of statute is entitled to great weight. *New York, P. & N. R. R.* v. *Peninsula Exchange*..... 34
In construing act of Congress court will not presume that because provisions not coterminous with power of Congress act was so framed for purpose of leaving subject, so far as unprovided for, beyond operation of any legal authority whatever. *Innes* v. *Tobin*..... 127
The question in what sense the word "officer" is used in § 32, Crim. Code, is not one involving the Constitution. *Lamar* v. *United States*..... 60
Florida statute of 1913, imposing special license taxes on merchants using profit sharing coupons and trading stamps, is not unconstitutional as impairing obligation of contracts, as it must be construed as having prospective operation. *Rast* v. *Van Deman & Lewis*..... 342
Judicial construction of will by state court of competent jurisdiction determines legally and practically extent and character of interests taken by legatees. *Uterhart* v. *United States*..... 598
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CONTINGENT INTERESTS. See **War Revenue Act.**

CONTRACTS:

Liberty of contract: There are many restrictions upon liberty of contract that do not amount to deprivation of liberty and property without due process of law. *Rast* v. *Van Deman & Lewis*..... 342
If business subject to regulation by State and imposition of privilege taxes, contracts made in its conduct are also subject to such regulation. *Id.*

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What constitutes contract: While offer by State, without particular person designated, and its acceptance, may constitute contract protected by Constitution, the offer and acceptance must have characteristics of bargain and be conventional counterparts. *Banning Co.* v. *California*..... 142
Expenditures, other than payment to State, by intended acceptor of offer to sell public lands, are but voluntary qualifications to become purchaser and are not binding on him or the State. *Id.*

Implied contracts: Riparian owner held not entitled to recover as upon an implied contract for taking his property by reason of damages alleged in consequence of exercise of power of Congress over navigable waters. *Willink* v. *United States*..... 572
Where officers of United States charged with matter have refused offer for use of invention, and have declined to use it, and, proceeding independently, make and use articles designed by themselves, claimed by patentee to embody his invention, there is no implied contract on part of Government to pay for use of invention; and Court of Claims without jurisdiction of claim prior to act of 1910. *Farnham* v. *United States*..... 537

Validity: Contract between carrier and independent employer of labor, by which latter assumes risk, held not an evasion of § 5 of Employers' Liability Act. *Chicago, R. I. & P. Ry.* v. *Bond* 449

Impairment of obligation: Ordinance requiring railway company to do certain paving held not an impairment of obligation of charter contract. *Southern Wisconsin Ry.* v. *Madison* 457

Performance: Ability to perform a contract is of its very essence, and delay resulting from absence of such ability is not due to unavoidable causes. *Carnegie Steel Co.* v. *United States* 156
That a contractor engaging to deliver armor plate of specified qualifications was delayed by unforeseen difficulties in the then new art of manufacturing does not excuse non-performance if such delays not within excepted reasons therefor. *Id.*
Contract of bill of lading of interstate shipment remains in force until actual delivery to consignee. Mere giving of receipt by consignee and payment of freight, goods remaining with carrier, held not to amount to actual delivery. *Southern Ry.* v. *Prescott*..... 632
Sub-contractor not bound by provisions in general contract between Government and contractor so as to be obliged to submit to delays resulting from action of Government permitted by original contract. *Guerini Stone Co.* v. *Carlin*..... 264

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Where State makes general offer to sell and provides for determination of conflicting claims of right to purchase, it is not bound by offer or precluded from withdrawing it until rightful claimant determined and payment of at least an installment of purchase price. *Banning Co.* v. *California*..... 142

Breach: Involuntary bankruptcy of promisor held to constitute anticipatory breach of executory contract; and that claim of promisee is one founded upon contract and provable under § 63a–4 of Act and that damages may be liquidated under § 63b. *Central Trust Co.* v. *Chicago Auditorium*..... 581

General rule is that where party bound by executory contract repudiates his obligation or disables himself from performance, promisee has option to treat contract as ended and may maintain action at once for damages occasioned by the anticipatory breach. *Id.*

In estimating profits that might be realized if a building contract had been proceeded with in ordinary manner to completion, no more definite and certain method can be adopted than to deduct from contract price the probable cost of furnishing the materials and doing the work. *Guerini Stone Co.* v. *Carlin*..... 264

Reformation: In a proper case reformation of a contract may be required against the United States, notwithstanding § 3744, Rev. Stat. *Ackerlind* v. *United States*..... 531

Contract reformed by striking out clause in printed form which it had been agreed should be, but by mistake had not been, stricken out. *Id.*

Failure of contractor to read contract before executing it, he having previously seen its terms, will not debar him from seeking its reformation. *Id.*

Rescission: Rule applicable to private contracts that vendor seeking to rescind must be ready to return consideration, not applicable to Government in suits to cancel patents for land. *Causey* v. *United States*..... 399

Secret arrangements with government officials by which they share in profits of contracts which they have voice in awarding vitiate contract justifying rescission, even though made without actual knowledge of contractor. *Crocker* v. *United States*..... 74

Recovery cannot be had upon government contract tainted with fraud and rescinded by proper officer of Government on that ground. *Id.*

Rescission of government contract to supply articles at speci-

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fied prices is no obstacle to recovery upon quantum valebat if requisite proof of value of articles delivered. *Id.*

Where finding by Court of Claims of fraud in fixing contract price of articles, that price cannot for the quantum valebat be regarded as admission by Government of value of articles delivered prior to discovery of fraud and recission of contract. *Id.*

Although principal contract between the Government and contractor gave the Government right to suspend, as contractor had not safeguarded himself by incorporating that provision into sub-contract, he was not relieved from damages caused sub-contractor by such suspension. *Guerini Stone Co.* v. *Carlin* 264

Limitations: Final settlement of account within meaning of Act of 1894 as amended in 1905, is not when final payment made, but is final administrative determination by proper authority of amount due, and suit by sub-contractor against surety commenced six months after date of such determination, but less than six months after payment, not prematurely brought in absence of suit by Government. *Illinois Surety Co.* v. *Peeler* 214

Construction: A provision in a sub-contract requiring the contractor to make monthly payments not exceeding 85% of cost of work erected cannot be construed to require precisely that percentage; nor can a provision that the sub-contractor furnish requisitions of the amount to be paid make the sub-contractor sole judge of the amount it is entitled to receive. *Guerini Stone Co.* v. *Carlin* 264

General contract between Government and contractor held inadmissible as against sub-contractor except for specific purpose mentioned in sub-contract. *Id.*

In case of sub-contracts, as of other written instruments, reference to extraneous writing for a particular purpose makes it part of agreement for that purpose only. *Id.*

See **Constitutional Law, IV.**

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act.**

CONVERSION:

One knowingly taking property of another cannot by changing its form or commingling it with property of his own acquire title by accession. *Union Naval Stores Co.* v. *United States*.... 284

One knowingly purchasing manufactured article from tres-

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passer who converted crude article must account for value as manufactured and can take no credit for labor of wrongdoer in manufacturing it. *Id.*

CORPORATIONS:
Residence: Corporation organized under laws of Illinois deemed resident of State within meaning of Chattel Mortgage Act, and county of residence is county where principal office located.. *Fairbanks Steam Shovel Co.* v. *Wills*..... 642
Residence within State of incorporation can be changed only by complying with law of State. *Fairbanks Steam Shovel Co.* v. *Wills*..... 642
Where Illinois corporation had its principal office in Cook County and such office was never legally established in any other county, a mortgage recorded in a different county did not comply with recording act of State and, as against trustee in bankruptcy, was invalid. *Id.*
A corporation is entitled to be sued in district of its residence, and District Court for another jurisdiction is without jurisdiction of action involving inherently Federal question. *Male* v. *Atchison, T. & S. F. Ry.*..... 97
Stockholders' rights: As to right of stockholder to enjoin corporation from voluntarily paying unconstitutional tax. See *Brushaber* v. *Union Pacific R. R. Co.*..... 1
In suit in equity by stockholder against other corporations to recover under § 7 of Anti-trust Act, court cannot enter decree requiring plaintiff's corporation to sue other corporations or permitting him to sue in its name and behalf. *Fleitmann* v. *Welsbach Co.*..... 27
Taxation: State may tax domestic corporation for privilege of being such, and such tax not necessarily invalid because measured on capital stock part of which may represent capital not taxable by State. *Kansas City Ry.* v. *Kansas*..... 227
State not debarred from taxing granted privilege of being corporation because corporation may be engaged in interstate commerce. *Id.*
Tax imposed by c. 135, Kansas Laws, 1913, on privilege of being corporation, is not, as to domestic corporation engaged in both interstate and intrastate commerce invalid either as violation of commerce clause, or of due process clause, of Constitution. *Id.*
Memberships in incorporated exchange, as property of respective members, are distinct from assets of corporation, and

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taxing members on membership and corporation on assets not double taxation. *Rogers* v. *Hennepin County* 184

Where objections to constitutionality of provisions of c. 135, Kansas Laws, 1913, taxing foreign corporations doing business in State for such privilege measured on proportion of stock used in State, rest in this case exclusively on asserted invalidity of similar provisions of same statute relative to domestic corporations, which have been found untenable, case controlled by former decision. *Lusk* v. *Kansas* 236

Leases that cannot be taxed as entity cannot be taxed vicariously by taxing stock of corporation owning them where only value of stock is value of the leases. *Indian Oil Co.* v. *Oklahoma* 522

Reorganization: In reorganization schemes substantial justice must be done and well settled rules of equity not transgressed. *Kansas City Southern Ry.* v. *Guardian Trust Co.* 166

Party attacking reorganization scheme as not adequately protecting unsecured creditors of corporation while providing for stockholders, held not barred by laches. *Id.*

Purchaser of railroad under foreclosure of mortgage and reorganization scheme which provides for stockholders of company, but not for unsecured creditors, held chargeable with unsecured debts. *Id.*

One owning both stock and floating debt of company whose property is under foreclosure, who assents to scheme of reorganization which does not show on its face that it unduly provides for stockholders and does not adequately provide for unsecured creditors, is not precluded from subsequently claiming that property chargeable after sale with his unsecured debt. *Id.*

COURT-MARTIAL:

Sentence essential to dismissal of officers of Army and Navy. *United States* v. *Andrews* 90

COURT OF CLAIMS:

Findings in action at law determine all matters of fact, and this court cannot refer to opinion for purpose of explaining or modifying them. *Crocker* v. *United States* 74

In absence of implied contract on part of Government to pay for use of invention, court could not take cognizance of claim for infringement prior to passage of act of 1910. *Farnham* v. *United States* 537

Although court may not have made findings in terms of cer-

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tain facts assumed in its decision to be true, if they are not controverted and appear in record it is not necessary to send case back for further finding. *Ackerlind* v. *United States*.... 531

COURTS:
Courts cannot supply by construction that which Congress has clearly shown its intention to omit. *Carey* v. *Donohue*.... 430
Courts cannot arbitrate differences of opinion as to whether state of facts sustains distinction in legislation. *Rast* v. *Van Deman & Lewis*..... 342
Courts may not, as original question, exert authority over subjects primarily within jurisdiction of Interstate Commerce Commission. *Loomis* v. *Lehigh Valley R. R*..... 43
Want of due process of law does not arise from want of wisdom in Congress in levying taxes and give courts power to overrule action of Congress by declaring it to be unconstitutional. *Brushaber* v. *Union Pacific R. R. Co*..... 1
Arguments as to expediency of levying tax within power of Congress are beyond judicial cognizance. *Id.*
Findings of fact in contests as to ownership under provisions of Atoka Agreement and subsequent legislative regulations, relative to purchase of town lots, made by commission or Indian Inspector, affirmed on final appeal by Secretary of Interior, are binding upon the courts in absence of gross mistake or fraud. *Johnson* v. *Riddle*..... 467
Power of legislature to regulate conduct and contracts upon its conception of the public welfare is only subject to review by courts when the legislation is unreasonable or arbitrary. *Rast* v. *Van Deman & Lewis*..... 342
Legislative regulation of use of profit sharing coupons and trading stamps is not to be impeached and overruled by courts on account of difference of opinion in regard to conclusion reached as to evils of use. *Id.*
See **Jurisdiction; Practice and Procedure.**

CRIMINAL CODE:
For sections construed, etc., see **Congress.**

CRIMINAL LAW:
Intent may make criminal act otherwise innocent, if it is a step in a plot. *Badders* v. *United States*..... 391
Objection that indictment does not charge crime against United States goes only to merits of case. *Lamar* v. *United States*..... 60

CRIMINAL LAW—*Continued.* PAGE

District Court has jurisdiction of all crimes cognizable under authority of United States and acts equally within its jurisdiction whether its decision is right or wrong. *Id.*

Congress may enact that each putting of letter in post office is separate offense. *Badders* v. *United States*..... 391

Congress has power to regulate overt act of putting letter into post office, and may prohibit under penalty, such an act when done in furtherance of a scheme, whether it can forbid scheme or not. *Id.*

Offense of false billing and representations specified in § 10 (3) of Commerce Act, as amended in 1910, applies to consignees as well as consignors of interstate shipments; and District Court of district of destination of shipment has jurisdiction of indictment of consignee for false representations made by him in liquidation of amount payable for freight at destination. *United States* v. *Union Mfg. Co*..... 605

Offense of false representations specified in par. 3, § 10, Commerce Act of 1910, may be committed where interstate transportation has already been completed and amount due therefor remains to be adjusted, the same as though the representations had preceded delivery to carrier for shipment. *Id.*

False personation by telephone of officer of United States takes effect where hearer is, and District Court of that district has jurisdiction of offense under § 32, Crim. Code. *Lamar* v. *United States*..... 60

Under § 32, Crim. Code, indictment is not for defrauding but for false personation with intent to defraud; and nature of fraud is immaterial. *Id.*

The question in what sense the word "officer" is used in § 32, Crim. Code, is not one involving the Constitution. *Id.*

See **Extradition.**

DAMAGES:

Mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation; and so held that damages not recoverable for delay in delivery of burial equipment. *Southern Express Co.* v. *Byers*.. 612

In action by Government to recover from trespasser for crude turpentine taken from public land, fact that precise quantity not shown does not entitle defendant to peremptory instruction or one to limit recovery to nominal damages, where probable amount ascertainable by jury. *Union Naval Stores Co.* v. *United States*..... 284

DAMAGES—*Continued.* PAGE

Liability of triple damages under § 7 of Anti-Trust Act only enforceable through verdict of jury in court of common law. *Fleitmann* v. *Welsbach Co.* 27

DEBTOR AND CREDITOR:

Trusts for life with income free from interference or control of creditors are, in Massachusetts, valid and effective against creditors and, under certain conditions, against assignees and trustees in bankruptcy. *Eaton* v. *Boston Trust Co.* 427

See **Bankruptcy; South Carolina.**

DELIVERY:

Mere giving of receipt by consignee of shipment and payment of freight, goods remaining with carrier, held not to amount to actual delivery. *Southern Ry.* v. *Prescott* 632

DEMURRAGE. See **Maritime Law.**

DISPENSARIES. See **South Carolina.**

DISTRICT COURTS. See **Jurisdiction.**

DOUBLE TAXATION. See **Taxes and Taxation.**

DUE PROCESS OF LAW. See **Constitutional Law, VI, VIII.**

EMINENT DOMAIN:

That Government contracts for cutting away land within harbor line location does not amount to taking of such land if there was no attempt to perform contract. *Willink* v. *United States* 572

Mere location of harbor lines does not amount to taking of property within lines or its appropriation to public use; nor does taking result from request of officer of United States to riparian owner to vacate, if such request not acceded to or enforced. *Id.*

Riparian owner held not entitled to recover as upon an implied contract for taking his property by reason of damages alleged in consequence of exercise of power of Congress over navigable waters. *Id.*

EMPLOYERS' LIABILITY ACT:

Scope: In so far as it deals with subjects Federal Act is paramount and exclusive, and recovery under it can be had only in mode prescribed and by and for persons enumerated. *Seaboard Air Line* v. *Kenney* 489

Law governing situation in action in state court under Act

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is equally the law of the State, whether derived from Congress or state legislature, and must be noticed by court. *Kansas City Ry.* v. *McAdow*..... 51

Who within: If employee of interstate carrier is employed in interstate commerce when killed, right of recovery against carrier depends upon Federal act, and widow of deceased cannot maintain action for benefit of herself, as next of kin for minor children, and for use and benefit of parents of deceased. *Pecos & N. T. Ry.* v. *Rosenbloom*..... 439

An independent contractor with an interstate carrier cannot recover, nor can his representative, under Act, even though injured or killed while engaged in services in interstate commerce. *Chicago, R. I. & P. Ry.* v. *Bond*..... 449

One controlling the manner of work done by himself and his employees, although subject to certain direction or information from carrier, is a contractor with and not a servant of the carrier within the meaning of the Act. *Id.*

Absence of definition of next of kin indicates purpose of Congress to leave determination of that question to state law. *Seaboard Air Line* v. *Kenney*..... 489

"Next of kin" not used in common-law significance and as excluding all persons not included in term thereunder. *Id.*

Ruling of state court that next of kin of intestate, who was illegitimate, were his half brothers and sisters legitimately born of the same mother, excludes by implication possibility of asserted father being person entitled to recover under Act. *Id.*

Contracts prohibited: Contract between carrier and independent employer of labor, by which latter assumes risk, held not an evasion of § 5 of Act. *Chicago, R. I. & P. Ry.* v. *Bond*..... 449

Contributory negligence as defense: Where there is nothing to extenuate negligence of employee, or confuse his judgment, and he knows not only imminent danger of situation, but how it can be averted by complying with rules of employer, there is no justification for a comparison of negligences or apportioning of their effect under provision of Act. *Great Northern Ry.* v. *Wiles*..... 444

Where two employees are necessarily working together, each has reasonable latitude in relying upon statements of other made in course of and as part of operation, and if statements made negligently result in injury of one properly relying thereon he is not barred from recovery under Act. *Illinois Central R. R.* v. *Skaggs*..... 66

Practice: Where, in case brought under Act, question simply

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whether there were matters for determination of jury, and no question as to interpretation or application of Act, this court will not disturb decision of court below unless error palpable. *Great Northern Ry.* v. *Knapp* 464
In cases arising under Act, not of exceptional character, court confines itself to mere announcement of its conclusion. *Id.*
Where statute of State is so similar to Federal Act that liability of employer not affected by question of which governs case, it is not necessary to determine that question. *Kansas City Ry.* v. *McAdow* 51
Verbal mistake in charge to jury as to interpretation of Act, defendant not being prejudiced thereby, held not reversible error. *Illinois Central R. R.* v. *Skaggs* 66

EQUAL PROTECTION OF THE LAW. See **Constitutional Law, VIII.**

EQUITY:
That many suits would have to be brought to recover taxes paid under unconstitutional statute and that meantime taxes imposed become lien and constitute cloud on title, held inadequate to sustain jurisdiction of equity to restrain collection of taxes. *Dodge* v. *Osborn* 118
Contested liability of surety on contractor's bond under Materialmen's Acts of 1894, 1905, not determinable in equity. *Illinois Surety Co.* v. *Peeler* 214
Where bill filed to restrain enforcement of state statute imposing license taxes on merchants using profit sharing coupons and trading stamps shows that conditions of complainant's business and property engaged therein are such that enforcement would produce irreparable injury, it furnishes ground for equitable relief. *Rast* v. *Van Deman & Lewis* 342
Suit by single stockholder of corporation against other corporations to require latter to pay former triple damages under § 7 of Anti-trust Act, not maintainable in equity. *Fleitmann* v. *Welsbach Co* 27
In suit by stockholder of corporation against other corporations to recover under § 7 of Anti-trust Act, court cannot enter decree requiring plaintiff's corporation to sue other corporations or permitting him to sue in its name and behalf. *Id.*

ESTATES OF DECEDENTS:
Right to succeed to property of decedent depends upon and is regulated by state law. *Uterhart* v. *United States* 598

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Judicial construction of will by state court of competent jurisdiction determines legally and practically extent and character of interests taken by legatees. *Id.*

On the construction of will by state court, *held*, that interests of residuary legatees were contingent prior to July 1, 1902, within meaning of Refunding Act of 1902, except as to such amounts as were actually paid to legatees prior to that date. *Id.*

ESTOPPEL:

Tenant is not estopped to show that landlord's title has expired or been terminated by operation of law. *Johnson* v. *Riddle* 467

Officer of Army accepting grant of leave without pay not estopped from demanding half pay allowed by statute, even in absence of protest at condition. *United States* v. *Andrews* 90

One owning both stock and floating debt of company whose property is under foreclosure, who assents to scheme of reorganization which does not show on its face that it unduly provides for stockholders and does not adequately provide for unsecured creditors, is not precluded from subsequently claiming that property chargeable after sale with his unsecured debt. *Kansas City Southern Ry.* v. *Guardian Trust Co.*.. 166

Earlier adopter of trade-mark estopped, under circumstances of this case, from asserting infringement. *Hanover Star Milling Co.* v. *Metcalf* 403

Failure of contractor to read contract before executing it, he having previously seen its terms, will not debar him from seeking its reformation. *Ackerlind* v. *United States* 531

EVIDENCE:

General contract between Government and contractor held inadmissible as against sub-contractor except for specific purpose mentioned in sub-contract. *Guerini Stone Co.* v. *Carlin* .. 264

Burden of proof to establish value upon a quantum valebat for articles delivered under contract rescinded for fraud, is on claimant. *Crocker* v. *United States* 74

Burden of proof not on complainant to show what portion of profits of infringer of trade-mark was derived from infringement. *Hamilton Shoe Co.* v. *Wolf Brothers* 251

Where loss of interstate shipment while in warehouse is admittedly by fire, burden is on plaintiff to prove negligence on part of carrier. *Southern Ry.* v. *Prescott* 632

EXCEPTIONS: PAGE

Extravagant and unnecessary multiplication of exceptions and assignments of error condemned. *Badders* v. *United States*.. 391

EXCHANGES:

Membership held property, notwithstanding restrictions upon use, and subject to taxation. *Rogers* v. *Hennepin County*.... 184

Memberships represent rights and privileges to be exercised at exchange where located; and State may fix situs for purpose of taxation, and in so doing, does not deprive non-resident members of property without due process of law. *Id.*

Memberships in incorporated exchange, as property of respective members, are distinct from assets of corporation, and taxing members on membership and corporation on assets not double taxation. *Id.*

Taxation of memberships in exchanges wherein business transactions conducted for profit not a denial of equal protection because memberships in other associations, not conducting business exchanges and where there are manifest distinctions are not also taxed. *Id.*

Whether memberships are taxable under state statutes is a matter of local law. *Id.*

Nothing in Constitution prevents taxation of membership restricted in use. *Id.*

EXEMPTIONS:

State has broad discretion as to tax exemptions. *Rogers* v. *Hennepin County*..... 184

Policy of Bankruptcy Act is to respect state exemptions. *Eaton* v. *Boston Trust Co*..... 427

EXTRADITION:

Art. IV of Constitution fully embraces subject of rendition of fugitives from justice between States and confers authority upon Congress to deal with that subject. *Innes* v. *Tobin*.... 127

Prior to Constitution fugitives from justice were surrendered between States through comity. *Id.*

Act of 1793 (§ 5278, R. S.) was enacted for purpose of controlling interstate rendition, and so far as its provisions operated, was exclusive of state power. *Id.*

Exclusive character of § 5278, R. S., does not relate to rendition between States of criminals involuntarily brought within surrendering State. *Id.*

Doctrine of asylum is not applicable to interstate rendition. *Id.*

Where there is nothing in record in habeas corpus proceeding

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to show that person demanded had not been in demanding State, there is no basis for assuming that rendition order conflicted with § 5278, R. S., in that respect because record did show that such person had come into surrendering State from State other than the one demanding. *Id.*

Section 5278, R. S., prohibits the surrender in one State for removal as a fugitive from justice to another State of one who clearly was not and could not have been such a fugitive from demanding State. *Id.*

FACTS:

Findings concurred in by master and lower courts will not be disturbed unless clearly erroneous. *Causey* v. *United States*.. 399

Findings in contests as to ownership under provisions of Atoka Agreement and subsequent legislative regulations, relative to purchase of town lots, made by commission or Indian Inspector, affirmed on final appeal by Secretary of Interior, are binding upon the courts in absence of gross mistake or fraud. *Johnson* v. *Riddle*..... 467

Where facts appear only in statement of lower court and in opinion, this court disposes of legal propositions in light of facts as so shown and elucidated. *Cardona* v. *Quinones*..... 83

A finding of public necessity for physical track connection must be supported by sufficient evidence; mere declaration of commission not sufficient. *Seaboard Air Line* v. *Georgia R. R. Comm*..... 324

Findings of Court of Claims in action at law determine all matters of fact, and this court cannot refer to opinion for purpose of explaining or modifying them. *Crocker* v. *United States*..... 74

Although Court of Claims may not have made findings in terms of certain facts assumed in its decision to be true, if they are not controverted and appear in record it is not necessary to send case back for further finding. *Ackerlind* v. *United States*..... 531

Where Court of Claims made no finding of value of goods furnished under contract rescinded for fraud, and stated in explanation that there was complete absence of evidence, case not remanded for such finding. *Crocker* v. *United States* 74

Under local practice in Nebraska, where trial by jury is waived in action at law, findings made by trial court have force and effect of verdict of jury and hearing in supreme court is not trial de novo. *Jones National Bank* v. *Yates*..... 541

FALSE PERSONATION: PAGE

False personation by telephone of officer of United States takes effect where hearer is, and District Court of that district has jurisdiction of offense under § 32, Crim. Code. *Lamar* v. *United States*..... 60

Under § 32, Crim. Code, indictment is not for defrauding but for false personation with intent to defraud; and nature of fraud is immaterial. *Id.*

FALSE REPRESENTATIONS. See **Interstate Commerce.**

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FEDERAL INSTRUMENTALITIES:

State may not tax for privilege of performing functions of. *Fidelity & Deposit Co.* v. *Pennsylvania*..... 319

Mere contracts between United States and private corporation do not make it an essential governmental agency and confer freedom from state control. *Id.*

Act of 1894, allowing certain corporations to be accepted as surety does not create them Federal instrumentalities free from state laws and taxation. *Id.*

Pennsylvania law of 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of Federal Government officials by surety companies under act of 1894, unconstitutional as interference with powers of Government. *Id.*

Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891 and 1905 are under protection of Government; lessee is Federal instrumentality; and State cannot tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. *Indian Oil Co.* v. *Oklahoma*..... 522

Provision in Philippine Tariff Act of 1905, exempting from tonnage dues vessels belonging to or employed in service of United States, does not apply to vessels not under control of United States. The ground of the exemption being to prevent interference with governmental agencies, it does not apply to independent carrier under contract with Government. *Ackerlind* v. *United States*..... 531

FEDERAL QUESTION:

Asserted right to judgment on bonds of corporation of Federal creation involves inherently Federal question. *Male* v. *Atchison, T. & S. F. Ry.*..... 97

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So far as controversies in case in Federal court depend alone upon right to sue because of residence of parties, they are personal and may be waived, and are not intrinsically and necessarily Federal; but if they involve Federal privileges not waived they are Federal questions directly appealable under § 238, Jud. Code. *Id.*

Whether contract based on bill of lading of interstate shipment issued pursuant to Commerce Act has been discharged, is a Federal question. *Southern Ry.* v. *Prescott*..... 632

Measure of liability of carrier of interstate shipment under bill of lading issued pursuant to Commerce Act is a Federal question; and none the less so because resolved by application of general principles of common law. *Id.*

Federal question first asserted in petition for rehearing in highest state court, which was denied without passing upon question, not open here. *St. Louis & S. F. R. R.* v. *Shepherd* 240

Although petition does not refer in terms to Federal statute, if it appears that case made is essentially one governed thereby, action inherently involves Federal question. *Jones National Bank* v. *Yates*..... 541

Whether damages for anticipatory breach of contract which one of party can cancel on notice after stated period can be recovered for life of contract or only up to end of such period after breach, involves no Federal question. *Central Trust Co.* v. *Chicago Auditorium*..... 581

In action for damages for unreasonable delay in transporting shipment of cattle in interstate commerce, assignments of error based on failure to give due effect to Federal statute held so devoid of merit as to be frivolous. *St. Louis & S. F. R. R.* v. *Shepherd*..... 240

If declaration on which case tried brings it under Employers' Liability Act, fact that particular allegation showing plaintiff was engaged in interstate commerce appeared as an amendment, does not raise Federal question. *Kansas City Ry.* v. *McAdow* 51

FELLOW SERVANTS. See **Employers' Liability Act.**

FLORIDA:

Statute requiring able-bodied men to do certain work on public roads within county of residence, not unconstitutional as contrary to Thirteenth Amendment or to due process provision of Fourteenth Amendment. *Butler* v. *Perry*..... 328

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using profit sharing coupons and trading stamps, is not unconstitutional as impairing obligation of contracts, as it must be construed as having prospective operation. *Rast* v. *Van Deman & Lewis*..... 342

FOOD AND DRUGS ACT:
As to constitutional validity of net weight lard statute of North Dakota, see *Armour & Co.* v. *North Dakota*..... 510

FOREST RESERVES:
Statutory provisions for forest reservations refer to any lands which are subject to disposition of Congress, whether surveyed or not. *United States* v. *Morrison*..... 192
Authority to establish Cascade Range Forest Reservation given to President by acts of 1891 and 1897, included power to make temporary withdrawals; and properly made order of Secretary of Interior regarded as act of President. *Id.*
Exception in proclamation of 1907, enlarging Cascade Range Forest Reserve, did not include sections referred to in § 4 of Oregon Enabling Act, but not included in completed survey. *Id.*

FOURTEENTH AMENDMENT. See **Constitutional Law, VIII.**

FRAUD:
Wrongdoer, whose patent to land cancelled by reason of his own fraud must restore land and abide judgment of Congress as to refund of consideration paid. *Causey* v. *United States*..... 399
Indictment under § 32, Crim. Code, is not for defrauding but for false personation with intent to defraud. *Lamar* v. *United States*..... 60
Secret arrangements with government officials by which they share in profits of contracts which they have voice in awarding vitiate contract justifying rescission, even though made without actual knowledge of contractor. *Crocker* v. *United States*..... 74
Recovery cannot be had upon government contract tainted with fraud and rescinded by proper officer of Government on that ground. *Id.*

FUGITIVES FROM JUSTICE. See **Extradition.**

FULL FAITH AND CREDIT. See **Constitutional Law, XIV.**

GARNISHMENT. See **Constitutional Law, XIV.** PAGE

GEORGIA:

Finding of Railroad Commission that public necessity existed for physical connection of tracks, and order therefor, held justified. *Seaboard Air Line* v. *Georgia R. R. Comm* 324

GEORGIA V. TENNESSEE COPPER COMPANY:

Former decrees in *Georgia* v. *Tennessee Copper Company* modified as to escapement of fumes, as to records to be kept and as to expense of inspection and division of costs. *Georgia* v. *Tennessee Copper Co.* 650

GOVERNMENTAL AGENCIES. See **Federal Instrumentalities.**

GOVERNMENT CONTRACTS. See **Contracts.**

HARBOR LINES. See **Navigable Waters.**

HEARING. See **Constitutional Law, VIII.**

HOMESTEADS. See **Public Lands.**

ILLINOIS:

Where corporation had its principal office in Cook County and such office was never legally established in any other county, a mortgage recorded in a different county did not comply with recording act of State and, as against trustee in bankruptcy, was invalid. *Fairbanks Steam Shovel Co.* v. *Wills*. 642

Corporation organized under laws of Illinois deemed resident of State within meaning of Chattel Mortgage Act, and county of residence is county where principal office located. *Id.*

INCOME TAX:

By Sixteenth Amendment all income taxes are relieved from rule of apportionment. *Brushaber* v. *Union Pacific R. R. Co.*. 1

Act is not unconstitutional as beyond general taxing power of Congress, or because of discriminations, inequalities or progressive increases on incomes, or method provided for computing income of corporations. *Tyee Realty Co.* v. *Anderson*. 115

Act is not unconstitutional under Sixteenth Amendment; nor by reason of retroactive operation; nor under due process provision of Fifth Amendment; nor as denial of due process or equal protection of the law by reason of the classi-

INCOME TAX—*Continued.* PAGE

fications therein; and the provisions for collecting income at source do not deny due process of law by reason of duties imposed upon corporations without compensation in connection with the payment of the tax by others. *Brushaber* v. *Union Pacific R. R. Co* 1

Stanton v. *Baltic Mining Co* 103

Tyee Realty Co. v. *Anderson* 115

Dodge v. *Brady* 122

There is no authority for taking taxation of mining corporations out of rule established by Sixteenth Amendment; nor is there basis for contention that tax is a direct one on the property itself, beyond the purview of the Amendment, and void for want of apportionment. *Stanton* v. *Baltic Mining Co* 103

Section 3224, Rev. Stat., is clearly within contemplation of par. L. *Dodge* v. *Osborn* 118

Provisions of §§ 3220, 3226, 3227, Rev. Stat., are applicable to proceeding for recovery of taxes illegally collected. *Id.*

INDIAN LANDS:

Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891, 1905, are under protection of Government; lessee is Federal instrumentality, and State cannot tax its interest in the leases. *Indian Oil Co.* v. *Oklahoma* 522

Under provisions relating to townsites in Atoka Agreement, preferential right to purchase improved lots was conferred upon owner of permanent improvements without regard to lawfulness of previous possession of land by such owner. *Johnson* v. *Riddle* 467

Under such provisions and subsequent legislative regulations, authority to appraise lots, to ascertain ownership and value of improvements, and dispose of lots, was conferred upon townsite commission and afterwards upon United States Indian Inspector under supervision of Secretary of the Interior. *Id.*

That tenant holding town lot in Chickasaw district of Choctaw Nation, under lease from non-citizen having no rights in the land, had retained possession after refusal to pay rent, thereby preventing landlord from erecting improvements, held not to estop tenant, who had erected permanent improvements thereon, from acquiring the lot in own right under provisions of Atoka Agreement. *Id.*

INDIAN LANDS—*Continued.* PAGE

Atoka Agreement, when ratified, superseded any and all customs sanctioning leasing of town lots to non-citizens of tribes; and its provisions could not be carried into effect without terminating existing rights of occupancy, saving as they coincided with ownership of permanent improvements. *Id.*

In case of contests, findings of fact by commission or inspector, affirmed on final appeal by Secretary of Interior, are binding on courts in absence of gross mistake or fraud; and judicial inquiry limited to determining whether there was clear error of law resulting in awarding right of purchase and ultimate issue of patent to wrong party. *Id.*

INDICTMENT AND INFORMATION. See **Criminal Law.**

INHERITANCE TAX. See **Successions.**

INJUNCTION:

Order of Interstate Commerce Commission, not supported by ascertained facts, enjoined. *Philadelphia & Reading Ry.* v. *United States* 334

While under act of Oct. 15, 1914, private parties can obtain injunction against threatened loss, that act in terms goes no farther. *Fleitmann* v. *Welsbach Co.* 27

User of design similar to that which earlier user had unsuccessfully sought to register as trade-mark may be enjoined from further use. *Straus* v. *Notaseme Co* 179

Section 3224, Rev. Stat. is clearly within contemplation of par. L of Income Tax Law. *Dodge* v. *Osborn.* 118

Under proper averments stockholder's suit to restrain corporation from voluntarily paying tax charged to be unconstitutional, is not violative of § 3224, Rev. Stat. *Brushaber* v. *Union Pacific R. R. Co.* 1

Suit not maintainable to enjoin assessment or collection of tax because of alleged unconstitutionality of statute imposing it. *Dodge* v. *Osborn.* 118

That many suits would have to be brought to recover taxes paid under unconstitutional statute and that meantime taxes imposed become lien and constitute cloud on title, held inadequate to sustain jurisdiction of equity to restrain collection of taxes. *Id.*

INSTRUCTIONS TO JURY:

Requested instruction that might mislead jury properly refused. *Guerini Stone Co.* v. *Carlin.* 264

INSTRUCTIONS TO JURY—*Continued.* PAGE

Verbal mistake in charge to jury as to interpretation of Employers' Liability Act, defendant not being prejudiced thereby, held not reversible error. *Illinois Central R. R.* v. *Skaggs*. 66

Rule that party may not sit silent until after verdict and then insist that it be set aside for failure of court to particularly specify in its charge some matter to which its attention had not been suitably called, is not altered by Minnesota statute under which errors may be specified on motion for new trial without taking exceptions. *Id.*

INSTRUMENTALITIES OF GOVERNMENT. See **Federal Instrumentalities.**

INTERLOCUTORY DECREES. See **Judgments and Decrees.**

INTERSTATE COMMERCE:

1. *Power of Congress over:* Rights and liabilities in connection with shipments depend upon acts of Congress, the bill of lading, and common-law principles enforced in Federal courts. *Southern Express Co.* v. *Byers*. 612

Measure of liability of carrier of interstate shipment under bill of lading issued pursuant to Commerce Act is to be governed under the act by uniform rule. *Southern Ry.* v. *Prescott*. 632

Measure of liability of carrier of interstate shipment under bill of lading issued pursuant to Commerce Act is a Federal question; and none the less so because resolved by application of general principles of common law. *Id.*

Where question whether person injured while riding free on engine of interstate train by consent of engineer could have recovered under state law had his presence been illegal under Federal statute, jury should have been charged that Federal act applied. *Illinois Central R. R.* v. *Messina*. 395

2. *Power of States over:* State not debarred from taxing granted privilege of being corporation because corporation may be engaged in interstate commerce. *Kansas City Ry.* v. *Kansas* 227

Whether state tax prohibited by commerce clause depends upon operation and effect as enforced and not upon characterization. *Id.*

State cannot lay tax on interstate commerce in any form, either upon business constituting such commerce, or privi-

INTERSTATE COMMERCE—*Continued.* PAGE

lege of engaging in it, or receipts as such derived therefrom. *Id.*

3. *Scope and purpose of act:* Electric railway from one point in State to another point therein, with traffic agreement with street railway company operating in another State held to be within the act. *Kansas City Ry.* v. *McAdow* 51

Uniformity the purpose of Act to Regulate. *Loomis* v. *Lehigh Valley R. R.* 43

4. *Burdens on and interference with:* Regulations of retail sales within State held not to amount to attempt to control interstate commerce. *Rast* v. *Van Deman & Lewis.* 342

Regulation of use of profit sharing coupons and trading stamps in connection with retail sales to individual purchasers and consumers and not designed to be used by manufacturer from another State to State of distribution, does not interfere with or burden interstate commerce. *Id.*

Tax imposed by c. 135, Kansas Laws, 1913, on privilege of being corporation, is not as to domestic corporation engaged in both interstate and intrastate commerce, invalid as violation of commerce clause of Constitution. *Kansas City Ry.* v. *Kansas* 227

5. *Tariffs:* Rule that both carrier and shipper bound by and cannot alter terms of service as fixed by filed regulations, applies not only to rates but to other stipulations relating to services and facilities, including liability as warehouseman. *Southern Ry.* v. *Prescott* 632

To determine validity and effect of restrictions on liability in bills of lading, applicable schedules of carrier on file with Commission are material. *Southern Express Co.* v. *Byers* .. 612

6. *Passes:* This court cannot limit prohibition of anti-pass provision of Hepburn Act to more formal uses than allowing persons to ride on interstate train by permission of employer of carrier. *Illinois Central R. R.* v. *Messina.* 395

7. *Contracts:* Contract of bill of lading of interstate shipment remains in force until actual delivery to consignee. Mere giving of receipt by consignee and payment of freight, goods remaining with carrier, held not to amount to actual delivery. *Southern Ry.* v. *Prescott* 632

8. *Shipper's service*: Problems in regard to allowances to shippers for doors and bulkheads appear to be complicated and administrative. *Loomis* v. *Lehigh Valley R. R.* 43

9. *False representations*: Offense of false billing and representations specified in § 10 (3) of Commerce Act, as amended

INTERSTATE COMMERCE—*Continued.* PAGE

in 1910, applies to consignees as well as consignors of interstate shipments; and District Court of district of destination of shipment has jurisdiction of indictment of consignee for false representations made by him in liquidation of amount payable for freight at destination. *United States* v. *Union Mfg. Co* 605

Offense of false representations specified in par. 3, § 10, Commerce Act of 1910, may be committed where interstate transportation has already been completed and amount due therefor remains to be adjusted, the same as though the representations had preceded delivery to carrier for shipment. *Id.*

10. *Reparation:* Under Carmack Amendment there can be recovery from initial carrier for loss, damage or injury for failure to transport with reasonable despatch on line of connecting carrier. *New York, P. & N. R. R.* v. *Peninsula Exchange.* 34

In action under Carmack Amendment to recover for delay in transportation, a charge that liability was amount of decline in value, due to delay, at place of destination, without stating limitation in filed tariff that damages should not exceed value at time and place of shipment, held not to deny carrier any Federal right, the amount awarded being less than value stated in tariff. *Id.*

A condition of filed tariff that carrier not bound to transport on particular train or vessel to arrive at particular market or otherwise than with reasonable despatch, does not relieve carrier from liability under Carmack Amendment for not delivering with reasonable despatch, although delay occurs on line of connecting carrier. *Id.*

11. *Transportation:* Transportation, as regulated by Commerce Act, includes services of connecting carrier as warehouseman of goods after arrival at destination and before actual delivery. *Southern Ry.* v. *Prescott* 632

Retention by carrier of part of interstate shipment after arrival at destination, notice to and payment of freight by consignee, held terminal service and part of transportation. *Id.*

INTERSTATE COMMERCE COMMISSION:

Commission has jurisdiction to make order requiring trunk line railways to reopen through routes and publish joint rates to interstate destinations with connecting tap lines,

INTERSTATE COMMERCE COMMISSION—*Continued.* PAGE
and to prohibit former from making to any tap lines allowance or division out of joint rates in excess of maximum prescribed. *O' Keefe* v. *United States* 294
Such order not based on erroneous principles of law, nor did it exclude competitive conditions from consideration, but established maximum divisions for purpose of preventing preferences as methods of competition. *Id.*
Order prescribing maximum rates, otherwise legal, does not deprive trunk line of its property without due process of law by denying it right to compete for business in a manner forbidden by Congress in the interest of public welfare. *Id.*
From complexity of tap line problems and importance of general rule for allowances to tap lines based on simple elements, court will not hold that adoption of mileage basis for such allowances is arbitrary. *Id.*
Presumption that Commission expert in matters of rate regulation and able to draw inferences from facts not necessarily obvious to others. *Id.*
Where no undue discrimination against shipper or locality of its plant is found, and community declared prejudiced has not complained and is not party to proceeding, and rate complained of is intrinsically reasonable, mere fact that other carriers have adopted lower schedule from shipper's district to points other than one designated, affords no foundation for Commission's finding that rate unreasonable and erroneous as matter of law, and its order should be enjoined. *Philadelphia & Reading Ry.* v. *United States* 334
Character of equipment which carrier must provide and allowances to shippers for instrumentalities supplied and services rendered, are matters for inquiry by Commission before submission to courts. *Loomis* v. *Lehigh Valley R. R.* 43
Courts may not, as original question, exert authority over subjects primarily within jurisdiction of Commission. *Id.*
Quære, whether trunk line can object to order of Commission on ground that allowance to connecting lines is too small and deprives it of opportunity to pay larger amount and obtain the business. *O' Keefe* v. *United States* 294

INTERSTATE RENDITION. See **Extradition.**

INVOLUNTARY SERVITUDE. See **Constitutional Law, VII.**

JUDGMENTS AND DECREES: PAGE

Adjudication of bankruptcy is not open to collateral attack. *Fairbanks Steam Shovel Co.* v. *Wills*. 642

Under full faith and credit clause of Constitution judgment of Virginia court against garnishee, entered without notice to defendant residing in West Virginia, held to protect garnishee in suit by defendant against him brought in West Virginia. *Baltimore & Ohio R. R.* v. *Hostetter* 620

On certiorari this court is called upon to notice any error that may have occurred in interlocutory proceedings, and is not bound to consider that interlocutory decree settled law of case because it refused to review it on certiorari. *Hamilton Shoe Co.* v. *Wolf Brothers* 251

A state commission appointed to close up business in which State engaged, having found that claimant was indebted to State in excess of its claim and entered an overjudgment therefor, held that, although such overjudgment was rendered without authority that fact did not affect power of commission to withdraw funds from county depositaries as they were state funds and subject to its control. *Carolina Glass Co.* v. *South Carolina* 305

A judgment or decree which determines the particular cause is final in sense of § 237, Jud. Code. *Detroit & M. Ry.* v. *Michigan Railroad Com.* 564

A judgment awarding or refusing mandamus is final within meaning of § 237, Jud. Code. *Id.*

Judgment finally disposing of petition for writ of prohibition is a final judgment: fact that denial of writ does not decide merits of principal suit is immaterial. *Mt. Vernon Cotton Co.* v. *Alabama Power Co.* 30

In suit in equity by stockholder of corporation against other corporations to recover under § 7 of Anti-trust Act, court cannot enter decree requiring plaintiff's corporation to sue other corporations or permitting him to sue in its name and behalf. *Fleitmann* v. *Welsbach Co.* 27

Although decree below based on profits gained in unfair competition, as proofs and findings were applicable to claim of compensation for infringing trade-mark to which claimant found entitled, decree affirmed. *Hamilton Shoe Co.* v. *Wolf Brothers.* 251

Former decrees in *Georgia* v. *Tennessee Copper Company* modified as to escapement of fumes, as to records to be kept and as to expense of inspection and division of costs. *Georgia* v. *Tennessee Copper Co.* 650

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Decree embodying report of commissioners. *North Carolina* v. *Tennessee* 652

JUDICIAL CODE:
For sections construed, etc., see **Congress.**

JUDICIARY. See **Courts; Jurisdiction.**

JURISDICTION:
I. **Generally.**
Jurisdiction is a matter of power and covers wrong as well as right decisions. *Lamar* v. *United States* 60
Liability of triple damages under § 7 of Anti-Trust Act only enforceable through verdict of jury in court of common law. *Fleitmann* v. *Welsbach Co.* 27
II. **Jurisdiction of this court.**
1. *Generally:* Correct valuation of property a matter for taxing officials; and, where no charge of denial of opportunity to be heard, this court does not review their judgment. *Rogers* v. *Hennepin County* 184
2. *Over judgments of Circuit Court of Appeals:* Jurisdiction to review on certiorari under § 240, Jud. Code, to be exercised sparingly and only in cases of peculiar gravity and general importance and to secure uniformity of decision. *Hamilton Shoe Co.* v. *Wolf Brothers* 251
Appeals from allowance or rejection of claims in bankruptcy, are, in absence of certificate, limited to cases involving Federal questions of kind described in § 237, Jud. Code. *Central Trust Co.* v. *Chicago Auditorium* 581
3. *Over judgments of District Court:* Under § 238, Jud. Code, jurisdiction exists of direct appeal from judgment refusing to enjoin corporation from paying income tax in suit by stockholder on ground of unconstitutionality of Income Tax Law. *Stanton* v. *Baltic Mining Co.* 103
Whether § 32, Crim. Code, covers falsely personating a Congressman, and whether a Congressman is a state or Federal officer, are not constitutional questions which can be made basis of direct appeal under § 241, Jud. Code. *Lamar* v. *United States* 60
Where no allegations of diverse citizenship and jurisdiction of Federal court invoked solely on constitutional grounds, writ of error issues direct from this court to District Court. *Carolina Glass Co.* v. *South Carolina* 305
4. *Over judgments of state courts:* A judgment or decree which

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determines the particular cause is final in sense of § 237, Jud. Code. *Detroit & M. Ry.* v. *Michigan Railroad Comm* 564

A judgment awarding or refusing mandamus is final within meaning of § 237, Jud. Code. *Id.*

Where petition does not refer in terms to Federal statute which determines defendant's liability, and case made is essentially one governed by the statute, the assertion by defendant in his answer that his liability, if any, must be determined under that statute, held simply a contention as to essential elements of plaintiff's claim; and where state court has denied liability under the statute this court has jurisdiction to review. *Jones National Bank* v. *Yates*..... 541

Where decision against plaintiff in error not upon independent state grounds but upon Federal question, review here under § 237, Jud. Code. *Rogers* v. *Hennepin County* 184

Where statement in per curiam opinion that case controlled by judgment in similar case in which same Federal questions decided, held that although other questions involved in this case, judgment did not rest upon independent state grounds. *Id.*

See **Appeal and Error.**

III. **Of Circuit Court of Appeals.**

Where no allegations of diverse citizenship and jurisdiction of Federal court invoked solely on constitutional grounds, court without jurisdiction to review. *Carolina Glass Co.* v. *South Carolina*..... 305

Where jurisdiction of District Court in trade-mark case rests on diversity of citizenship, decision is final and can only be reviewed on certiorari. *Hanover Star Milling Co.* v. *Metcalf* 403

IV. **Of District Courts.**

A suit against a state commission held to be in effect a suit against State not maintainable in Federal court. *Carolina Glass Co.* v. *South Carolina* 305

A corporation is entitled to be sued in district of its residence, and District Court for another jurisdiction is without jurisdiction of action involving inherently Federal question. *Male* v. *Atchison, T. & S. F. Ry*..... 97

Jurisdiction exists of suit by stockholder to restrain corporation from voluntarily paying tax charged to be unconstitutional. *Brushaber* v. *Union Pacific R. R. Co*..... 1

Stanton v. *Baltic Mining Co*..... 103

Court has jurisdiction of all crimes cognizable under authority of United States and acts equally within its jurisdiction

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whether its decision is right or wrong. *Lamar* v. *United States*. 60

False personation by telephone of officer of United States takes effect where hearer is, and court of that district has jurisdiction of offense under § 32, Crim. Code. *Id.*

Where bill states that municipality intends to take plaintiff's property rights without compensation, and has taken steps that will destroy such rights, and that in doing so it purports to be acting under an ordinance violative of Constitution, held that such action is to be regarded that of State and court had jurisdiction. *Cuyahoga River Power Co.* v. *Akron*. 462

When two or more having separate and distinct demands unite in suit, demand of each must be of requisite amount; but where several unite to enforce single title or right in which they have common and undivided interest, court has jurisdiction if they collectively equal amount. *Pinel* v. *Pinel*. 594

In suit by two children of testator, one claiming an one-eighth and the other a two-eighths undivided share of estate, maximum value of which less than $12,000, *held* that the interests were separate and distinct and could not be aggregated in determining jurisdictional amount. *Id.*

Under § 24 (1), Jud. Code, where jurisdiction based on diverse citizenship, matter in controversy must appear by distinct averments in bill, or otherwise from proof, to exceed $3,000. *Id.*

Court of district where consignee of interstate shipment made false representations in liquidation of amount payable for freight at destination, has jurisdiction of indictment charging consignee with offense under § 10 (3) of Act to Regulate Commerce as amended in 1910. *United States* v. *Union Mfg. Co*. 605

V. **Of Interstate Commerce Commission.** See **Interstate Commerce Commission.**

VI. **Of Court of Claims.** See **Court of Claims.**

KANSAS:

Where statute of State, [redacted] in Kansas, is so similar to Federal Employers' Liability Act that liability of employer not affected by question of which governs case, it is not necessary to determine that question. *Kansas City Ry.* v. *McAdow* 51

Where objections to constitutionality of provisions of c. 135,

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Laws, 1913, taxing foreign corporations doing business in State for such privilege measured on proportion of stock used in State, rest in this case exclusively on asserted invalidity of similar provisions of same statute relative to domestic corporations, which have been found untenable, case controlled by former decision. *Lusk* v. *Kansas*..... 236

Such tax is not, as to domestic corporation engaged in both interstate and intrastate commerce, invalid either as violation of commerce clause, or of due process clause, of Constitution. *Kansas City Ry.* v. *Kansas*..... 227

Held, as matter of fact in this case, that there was no such commencement of building as would give mechanics' liens priority over mortgages within meaning of Kansas statute. *Varner* v. *New Hampshire Savings Bank*..... 617

LABOR:

Involuntary servitude within meaning of Constitution does not interdict enforcement of duties owed by individuals to State. *Butler* v. *Perry*..... 328

State has inherent power to require every able-bodied man within jurisdiction to labor for reasonable period on public roads near residence without direct compensation. *Id.*

Such requirement does not amount to involuntary servitude under Constitution; nor does it deprive persons of liberty and property without due process of law. *Id.*

LACHES:

Trade-mark rights may be lost by laches. *Hanover Star Milling Co.* v. *Metcalf*..... 403

Party attacking reorganization scheme as not adequately protecting unsecured creditors of corporation while providing for stockholders, *held* not barred by laches. *Kansas City Southern Ry.* v. *Guardian Trust Co*..... 166

LAND GRANTS. See **Indian Lands; Public Lands.**

LANDLORD AND TENANT:

Tenant is not estopped to show that landlord's title has expired or been terminated by operation of law. *Johnson* v. *Riddle*..... 467

That tenant holding town lot in Chickasaw district of Choctaw Nation, under lease from non-citizen having no rights in the land, had retained possession after refusal to pay rent, thereby preventing landlord from erecting im-

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provements, *held* not to estop tenant, who had erected permanent improvements thereon, from acquiring the lot in own right under provisions of Atoka Agreement. *Id.*

LAW GOVERNING:
Right to succeed to property of decedent depends upon and is regulated by state law. *Uterhart* v. *United States*..... 598
Where neither of parties, citizens of different States, has registered trade-mark in dispute, and no local rule is shown, cases involving use of such trade-mark determined according to applicable common law principles. *Hanover Star Milling Co.* v. *Metcalf*..... 403
Where statute of State is so similar to Federal Employers' Liability Act that liability of employer not affected by question of which governs case, it is not necessary to determine that question. *Kansas City Ry.* v. *McAdow*..... 51
Law governing situation in action in state court under Employers' Liability Act is equally the law of the State, whether derived from Congress or state legislature, and must be noticed by court. *Id.*

LEASE:
Tax upon lease made is one on power to make lease. *Indian Oil Co.* v. *Oklahoma*..... 522
Leases that cannot be taxed as entity cannot be taxed vicariously by taxing stock of corporation owning them where only value of stock is value of the leases. *Id.*
Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891 and 1905 are under protection of Government; lessee is Federal instrumentality; and State cannot tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. *Id.*

LEGISLATIVE FUNCTIONS:
It is within power of legislature to consider use of profit sharing coupons and trading stamps as having evils similar to a lottery. *Rast* v. *Van Deman & Lewis*..... 342
It is for legislature to discern and correct evils, not only of definite injury, but such as are obstacles to greater public welfare if within legislative authority. *Id.*
Power of legislature to regulate conduct and contracts upon its conception of the public welfare is only subject to review

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by courts when the legislation is unreasonable or arbitrary. *Id.*

Legislative regulation of use of profit sharing coupons and trading stamps is not to be impeached and overruled by courts on account of difference of opinion in regard to conclusion reached as to evils of use. *Id.*

Discernment and correction of evils resulting from use of profit sharing coupons and trading stamps is within legislative authority. *Id.*

See **Congress.**

LIENS:

Held, as matter of fact in this case, that there was no such commencement of building as would give mechanics' liens priority over mortgages within meaning of Kansas statute. *Varner* v. *New Hampshire Savings Bank* 617

LIMITATION OF LIABILITY. See **Interstate Commerce.**

LIMITATIONS:

Accrual of right of action by sub-contractor under Materialmen's Acts of 1894 and 1905. See *Illinois Surety Co.* v. *Peeler* 214

LOCAL LAW:

Whether memberships in exchanges are taxable under state statutes is a matter of local law. *Rogers* v. *Hennepin County* 184

In absence of clear error, this court upholds action of lower court as to matters concerning purely local law. *Cardona* v. *Quinones*..... 83

See **Law Governing and captions of various States, Territories and Insular Possessions.**

MAILS:

Congress has power to regulate overt act of putting letter into post office, and may prohibit, under penalty, such an act when done in furtherance of a scheme, whether it can forbid scheme or not. *Badders* v. *United States* 391

Congress may enact that each putting of letter in post office is separate offense. *Id.*

MANDAMUS:

A proceeding in mandamus is an independent adversary suit. *Detroit & M. Ry.* v. *Michigan Railroad Comm.*..... 564

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A judgment awarding or refusing mandamus is final within meaning of § 237, Jud. Code. *Id.*

Granting writ requiring railroad to comply with order of state commission, which is prima facie lawful, pending determination of suit to enjoin enforcement of order, *held*, in view of circumstances and requirement that bond of indemnity be given, not to deprive railroad of due process of law. *Id.*

MARITIME LAW:

When Government guarantees only certain depth of water at unloading dock and there is lack of finding that there was generally an available greater depth, a claim for demurrage cannot be based on failure to unload vessel of such greater draft at said dock. *Ackerlind* v. *United States*..... 531

Provision in Philippine Tariff Act of 1905, exempting from tonnage dues vessels belonging to or employed in service of United States, does not apply to vessels not under control of United States. The ground of the exemption being to prevent interference with governmental agencies, it does not apply to independent carrier under contract with Government. *Id.*

MASSACHUSETTS:

Trust for life with income free from interference or control of creditors are valid and effective against creditors and, under certain conditions, against assignees and trustees in bankruptcy. *Eaton* v. *Boston Trust Co*..... 427

MASTER AND SERVANT. See **Employers' Liability Act.**

MATERIALMEN'S ACT:

Action under Acts of 1894, 1905, is at law and not in equity. *Illinois Surety Co.* v. *Peeler*..... 214

Where subcontractor not one of original plaintiffs in action on bond, nor intervenor, judgment not to be rendered in its favor more than year after final settlement of contractor's claim; nor does fact that one claiming, but not proving such claim, to be its assignee, was made party plaintiff, amount to sufficient and timely filing of claim of such subcontractor. *Id.*

If surety does not contest, but pays into court full amount of liability, proceeding is simply one for distribution of fund in court. *Id.*

When action on contractor's bond brought within proper

MATERIALMEN'S ACT—*Continued.* PAGE
time, amendment after time, which does not set up new or different cause of action, but merely corrects defective statement, allowable. *Id.*
Final settlement of account within meaning of Act of 1894, as amended in 1905, is not when final payment made, but is final administrative determination by proper authority of amount due, and suit by subcontractor against surety commenced six months after date of such determination, but less than six months after payment, not prematurely brought in absence of suit by Government. *Id.*

MEASURE OF DAMAGES. See **Damages.**

MEMBERSHIP IN EXCHANGE. See **Exchanges.**

MEMBERS OF CONGRESS:
False personation as crime under § 32, Crim. Code. See *Lamar* v. *United States*..... 60

MENTAL ANGUISH:
No right of recovery for. *Southern Express Co.* v. *Byers*.... 612

MINES AND MINING:
Independently of operations of Sixteenth Amendment, a tax on product of mine is not a tax upon property as such because of its ownership, but is a true excise. *Stanton* v. *Baltic Mining Co.*..... 103
There is no authority for taking taxation of mining corporations out of rule established by Sixteenth Amendment; nor is there basis for contention that tax is a direct one on the property itself, beyond the purview of the Amendment, and void for want of apportionment. *Id.*

MINNESOTA:
Rule that party not entitled to sit silent until after verdict and then insist that it be set aside for failure of court to particularly specify in its charge some matter to which its attention had not been suitably called, is not altered by statute under which errors may be specified on motion for new trial without taking exceptions. *Illinois Central R. R.* v. *Skaggs* 66

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Laws providing for establishment of road improvement districts not unconstitutional under due process provision of Fourteenth Amendment. *Embree* v. *Kansas City Road District*..... 242

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That purchaser had mortgage on product, both crude and manufactured, of trespasser, which contained an after-acquired property clause and covered a large amount of other property, does not affect right of United States to recover that part of manufactured product found to be result of crude article taken from government land. *Union Naval Stores Co.* v. *United States*..... 284

Where Illinois corporation had its principal office in Cook County and such office was never legally established in any other county, a mortgage recorded in a different county did not comply with recording act of State and, as against trustee in bankruptcy, was invalid. *Fairbanks Steam Shovel Co.* v. *Wills*..... 642

If chattel mortgage not valid against trustee in bankruptcy because not properly recorded, mortgagee's title not perfected by taking possession after petition and before adjudication. *Id.*

Status as third person entitled as such to benefits of recording provisions of Mortgage Law of Porto Rico. See *Cardona* v. *Quinones*..... 83

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Directors who knowingly make statements required by National Bank Act that are false, or who, knowingly permit, assent to and allow the same to be made and published, are liable at suit of creditors. *Jones National Bank* v. *Yates*.. 541

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Riparian owner held not entitled to recover as upon an implied contract for taking his property by reason of damages alleged in consequence of exercise of power of Congress over navigable waters. *Willink* v. *United States*..... 572

Mere location of harbor lines does not amount to taking of property within lines or its appropriation to public use; nor does taking result from request of officer of United States to riparian owner to vacate, if such request not acceded to or enforced. *Id.*

That Government contracts for cutting away land within

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harbor line location does not amount to taking of such land if there was no attempt to perform contract. *Id.*
Rights in land below mean high water line of navigable and tidal river are subordinate to public right of navigation and power of Congress to employ all appropriate means to keep river navigable. *Id.*
Congress may prevent renewal of obstructions below mean high water which may affect navigation; and owner is not entitled to compensation therefor. *Id.*

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Under local practice, where trial by jury is waived in action at law, findings made by trial court have force and effect of verdict of jury and hearing in supreme court is not trial *de novo*. *Jones National Bank* v. *Yates*. 541

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Such statute is not repugnant to Food and Drugs Act of 1906. *Id.*

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Oil leases of land made by Osage Indians under authority of acts of 1891, 1905, are under protection of Government; lessee is Federal instrumentality, and State cannot tax its interest in the leases. *Indian Oil Co.* v. *Oklahoma* 522

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Oregon did not, under § 4, Act of 1859, take title to sections 16, 36, prior to survey, until which time and until title vested in State, Congress had power to dispose of them on compensating State for resulting deficiency. *United States* v. *Morrison*..... 192
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Exception in proclamation of 1907, enlarging Cascade Range Forest Reserve, did not include sections referred to in § 4 of Enabling Act, but not included in completed survey. *Id.*

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Where question whether person injured while riding free on engine of interstate train by consent of engineer could have

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This court cannot limit prohibition of anti-pass provision of Hepburn Act to more formal uses than allowing persons to ride on interstate train by permission of employer of carrier. *Id.*

PATENT FOR INVENTION:
Where officers of United States charged with matter have refused offer for use of invention, and have declined to use it, and, proceeding independently, make and use articles designed by themselves, claimed by patentee to embody his invention, there is no implied contract on part of Government to pay for use of invention; and Court of Claims without jurisdiction of claim prior to act of 1910. *Farnham* v. *United States* 537

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Florida statute of 1913, imposing license taxes on merchants using profit sharing coupons and trading stamps does not deprive of due process of law because of severity of its penalties intimidating against testing legality. *Rast* v. *Van Deman & Lewis.* 342
Punishment on each of five counts, of five years, periods being concurrent, and fine of $1,000 on each of seven counts, *held* not to be cruel and unusual within prohibition of Constitution. *Badders* v. *United States* 391

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Law of 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of Federal government officials by surety companies under act of 1894, unconstitutional as interference with powers of government. *Fidelity & Deposit Co.* v. *Pennsylvania.* 319

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Provision in Tariff Act of 1905, exempting from tonnage dues vessels belonging to or employed in service of United States, does not apply to vessels not under control of United States. The ground of the exemption being to prevent interference with governmental agencies, it does not apply to independent carrier under contract with Government. *Ackerlind* v. *United States*. 531

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When action on contractor's bond brought within proper time, amendment, after time, which does not set up new or different cause of action, but merely corrects defective statement, allowable. *Illinois Surety Co.* v. *Peeler* 214

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Police statutes, otherwise valid, may, without denying equal protection of the law, contain practical groupings of objects which fairly well present a class, although there may be exceptions in which the evil aimed at is deemed to be not so flagrant. *St. Louis, I. M. & S. Ry.* v. *Arkansas* 518

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Where, on hearing in state supreme court, which was not a trial *de novo*, judgment of trial court for plaintiff on findings equivalent to verdict of jury was reversed on ground that plaintiff's case was legally insufficient under Federal statute, questions in this court are whether such findings were supported by substantial evidence and justified recovery under the statute. *Jones National Bank* v. *Yates*. 541

In cases arising under Employers' Liability Act, not of exceptional character, court confines itself to mere announcement of its conclusion. *Great Northern Ry.* v. *Knapp* 464

On certiorari this court is called upon to notice any error that may have occurred in interlocutory proceedings, and is not bound to consider that interlocutory decree settled law of case because it refused to review it on certiorari. *Hamilton Shoe Co.* v. *Wolf Brothers* 251

Federal question first asserted in petition for rehearing in highest state court, which was denied without passing upon question, not open here. *St. Louis & S. F. R. R.* v. *Shepherd* 240

Disposition of case: While there may have been ground for District Court dismissing for want of jurisdiction, as there was a basis for taking jurisdiction and decision of court was clearly right on merits, this court affirms judgment. *Dodge* v. *Brady* 122

Where, in case brought under Employers' Liability Act, question simply whether there were matters for determination of jury, and no question as to interpretation or application of Act, this court will not disturb decision of court below unless error palpable. *Great Northern Ry.* v. *Knapp* 464

Dismissal of petition asserting claim against Government for use of invention because not based on implied contract, without prejudice to right to present claim for infringement under act of 1910. *Farnham* v. *United States*. 537

Argument: Where defendant corporation notified Government of pendency of suit to restrain it from voluntarily paying tax imposed by Tariff Act of 1913, United States heard as *amicus curiæ* in support of constitutionality of Act. *Brushaber* v. *Union Pacific R. R. Co*. 1

Following findings of fact: Findings of fact concurred in by master and lower courts will not be disturbed unless clearly erroneous. *Causey* v. *United States*. 399

Findings of master and lower courts that original entryman of public lands had entered into unlawful agreement to pass title, followed. *Id.*

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Although Court of Claims may not have made findings in terms of certain facts assumed in its decision to be true, if they are not controverted and appear in record it is not necessary to send case back for further finding. *Ackerlind* v. *United States*. 531

Where Court of Claims made no finding of value of goods furnished under contract rescinded for fraud, and stated in explanation that there was complete absence of evidence, case not remanded for such finding. *Crocker* v. *United States* 74

Court cannot refer to opinion of Court of Claims for purpose of explaining or modifying that court's findings. *Id.*

Where facts appear only in statement of lower court and in opinion, this court disposes of legal propositions in light of facts as so shown and elucidated. *Cardona* v. *Quinones* 83

Following state court: In absence of clear error, this court upholds action of lower court as to matters concerning purely local law. *Cardona* v. *Quinones*. 83

On denial of prohibition by state court all points urged exclusively under state constitution are taken to have been decided adversely to plaintiff in error; and this court in such respect follows state court. *Mt. Vernon Cotton Co.* v. *Alabama Power Co.* 30

Exceptions: Extravagant and unnecessary multiplication of exceptions and assignments of error condemned. *Badders* v. *United States*. 391

Rule that party may not sit silent until after verdict and then insist that it be set aside for failure of court to particularly specify in its charge some matter to which its attention had not been suitably called, is not altered by Minnesota statute under which errors may be specified on motion for new trial without taking exceptions. *Illinois Central R. R.* v. *Skaggs* 66

Pleading: Under § 24 (1), Jud. Code, where jurisdiction based on diverse citizenship, matter in controversy must appear by distinct averments in bill, or otherwise from proof, to exceed $3,000. *Pinel* v. *Pinel*. 594

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Disposition of public lands by President under authority of Congress is disposition by Congress. *United States* v. *Morrison* 192

Authority to establish Cascade Range Forest Reservation given by acts of 1891 and 1897, included power to make temporary withdrawals; and properly made order of Secretary of Interior regarded as act of President. *Id.*

Power to dismiss civil officers not applicable to officers of Army and Navy whose dismissal regulated by § 1229, Rev. Stat. *United States* v. *Andrews*. 90

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Presumption that Interstate Commerce Commission expert in matters of rate regulation and able to draw inferences from facts not necessarily obvious to others. *O'Keefe* v. *United States*. 294

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PROHIBITION:

Is distinct suit and judgment finally disposing of it is final within meaning of § 237, Jud. Code: fact that denial of writ does not decide merits of principal suit is immaterial. *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*. 30

On denial by state court all points urged exclusively under state constitution are taken to have been decided adversely to plaintiff in error; and this court in such respect follows state court. *Id.*

PROPERTY RIGHTS:

Right to use trade-mark is property. *Hamilton Shoe Co.* v. *Wolf Brothers*. 251

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Interest of citizen: Under act of 1875, rights of railroad entitled to benefit thereof are paramount over those of homestead entryman holding patent in consequence of rights initiated after line was in course of construction but before map of right of way filed. *Barlow* v. *Northern Pacific Ry.*... 484

Agreement to obtain land for another disqualifies entryman from acquiring title either by five years' residence and cultivation or by commutation and payment of minimum price. *Id.*

Findings of master and lower courts that original entryman of public lands had entered into unlawful agreement to pass title, followed. *Causey* v. *United States* 399

Expenditures, other than payment to State, by intended acceptor of offer to sell public lands, are but voluntary qualifications to become purchaser and are not binding upon him or the State. *Banning Co.* v. *California* 142

Homestead entries remain public land until patent issues, subject to right of homesteader to treat land as own only so far as necessary to carry out purposes of act; and this does not include taking of turpentine and rosin for sale and profit. *Union Naval Stores Co.* v. *United States* 284

Boxing and clipping trees for extracting turpentine and rosin is not cultivation. *Id.*

Act of 1906 (§ 51, Crim. Code), prohibiting boxing of trees for turpentine, rendered criminal what had been actionable; and one who, prior to act, conducted turpentine operations under unperfected homestead entry held a willful trespasser. *Id.*

Interest of Government: Where trespass willful United States entitled to product manufactured by third person who knowingly purchased crude material from trespasser. *Union Naval Stores Co.* v. *United States* 284

Where evidence from which jury could form reasonably certain estimate of amount of crude product taken, and probable amount of manufactured product therefrom, defendant held not entitled to peremptory instruction in his favor, or one to limit recovery to nominal damages. *Id.*

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Claim of United States for spirits of turpentine and rosin taken from government lands not fatally defective because property taken was crude, nor because land described by distinctive general description by which known. *Id.*

That purchaser had mortgage on product, both crude and manufactured, of trespasser, which contained an after-acquired property clause and covered a large amount of other property, does not affect right of United States to recover that part of manufactured product found to be result of crude article taken from government land. *Id.*

Disposition of public lands by President under authority of Congress is disposition by Congress. *United States* v. *Morrison* 192

Oregon did not, under § 4, Act of 1859, take title to sections 16, 36, prior to survey, until which time and until title vested in State, Congress had power to dispose of them on compensating State for resulting deficiency. *Id.*

Nothing in act of 1859, § 2275, Rev. Stat., or act of 1891, operated to pass title to Oregon of sections 16 and 36 at any intermediate stage of survey, or imposed any limitations on Congress to dispose thereof before title passed to State. *Id.*

Although California statute of 1863 gave private parties right to acquire tide lands, abrogation of right by later statutes and constitution not unconstitutional under contract clause as to those who had not paid any part of purchase price prior thereto. *Banning Co.* v. *California* 142

Withdrawal from sale of lands by State before any right consummated not an impairment of contract. *Id.*

Cancellation of patent: Wrongdoer, whose patent to land cancelled by reason of his own fraud must restore land and abide judgment of Congress as to refund of consideration paid. *Causey* v. *United States* 399

Rule applicable to private contracts that vendor seeking to rescind must be ready to return consideration, not applicable to Government in suits to cancel patents for land. *Id.*

It is essential that suit in name of United States to cancel homestead patent be brought with approval of Attorney General, and it is sufficient if United States is represented in this court by assistant attorney general and there is production of letter of Attorney General authorizing the suit. *Id.*

Surveys: Surveying is an administrative act confided to designated Federal officers who have power to direct how surveys shall be made; and until all requirements fulfilled

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A survey is incomplete until formally approved by Commissioner of Land Office; and even though approved without modification it does not so relate back to date of grant or field survey as to destroy power of Congress to dispose of lands while unsurveyed. *Id.*
Forest reserves: Statutory provisions for reservations refer to any lands which are subject to disposition of Congress, whether surveyed or not. *United States* v. *Morrison*..... 192
Authority to establish Cascade Range Reservation given to President by acts of 1891 and 1897, included power to make temporary withdrawals; and properly made order of Secretary of Interior regarded as act of President. *Id.*
Exception in proclamation of 1907, enlarging Cascade Range Reserve, did not include sections referred to in § 4 of Oregon Enabling Act, but not included in completed survey. *Id.*
Quære, whether State may await extinguishment of reserve including lands granted, but title to which not vested, and then take granted lands. *Id.*

PUBLIC NECESSITY. See **Railroads.**

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Secret arrangements with government officials by which they share in profits of contracts which they have voice in awarding vitiate contract justifying rescission, even though made without actual knowledge of contractor. *Crocker* v. *United States*..... 74
Public policy prohibits attempt by unauthorized agreement with officer of United States, under guise of condition or otherwise, to deprive him of statutory right to pay. *United States* v. *Andrews*..... 90
As to right of President to dismiss officers of Army or Navy. *Id.*
Powers relative to surveying public lands. See *United States* v. *Morrison*..... 192
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Prohibits attempt by unauthorized agreement with officer of United States, under guise of condition or otherwise, to deprive him of statutory right to pay. *United States* v. *Andrews*..... 90

PUBLIC WELFARE: PAGE

There is an inseparable union between the public good and due regard for private rights. *Embree* v. *Kansas City Road District*..... 242

PURE FOOD AND DRUGS ACT:

Net weight lard statute of North Dakota is not repugnant to Food and Drugs Act of 1906. *Armour & Co.* v. *North Dakota*..... 510

QUANTUM VALEBAT:

Rescission of government contract to supply articles at specified prices is no obstacle to recovery upon quantum valebat if requisite proof of value of articles delivered. *Crocker* v. *United States*..... 74

Where finding by Court of Claims of fraud in fixing contract price of articles, that price cannot for the *quantum valebat* be regarded as admission by Government of value of articles delivered prior to discovery of fraud and rescission of contract. *Id.*

Burden of proof to establish value upon a *quantum valebat* for articles delivered under contract rescinded for fraud, is on claimant. *Id.*

RAILROADS:

State, acting through administrative body, may require railroads to make physical track connections where public necessity exists therefor. *Seaboard Air Line* v. *Georgia R. R. Comm.*..... 324

In determining whether such public necessity exists just regard should be given to probable resulting advantages and to necessary expense involved. *Id.*

A finding of public necessity for physical track connection must be supported by sufficient evidence; mere declaration of commission not sufficient. *Id.*

Finding of Railroad Commission of Georgia that public necessity existed for physical connection of tracks, and order therefor, held justified. *Id.*

Charter provision that railway keep space between tracks and one foot on either side in proper repair so as not to interfere with travel over same, held broad enough to cover requirement that space be paved with asphalt when rest of street so paved. *Southern Wisconsin Ry.* v. *Madison*..... 457

Purchaser of railroad under foreclosure of mortgage and reorganization scheme which provides for stockholders of

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company, but not for unsecured creditors, held chargeable with unsecured debts. *Kansas City Southern Ry.* v. *Guardian Trust Co.* 166

A trunk line has no constitutional right to build up business by acts forbidden by Congress in interest of public welfare; and an order of the Interstate Commerce Commission prescribing maximum rates, otherwise legal, does not deprive line of its property without due process by denying it right to compete for business in that manner. *O' Keefe* v. *United States.* 294

Ordinance requiring certain paving held not an impairment of obligation of charter contract or violation of due process or equal protection of the law. *Southern Wisconsin Ry.* v. *Madison.* 457

Under act of 1875, rights of railroad entitled to benefit thereof are paramount over those of homestead entryman holding patent in consequence of rights initiated after line was in course of construction but before map of right of way filed. *Barlow* v. *Northern Pacific Ry.* 484

Arkansas statute requiring full switching crews on railroads over one hundred miles in length is not unconstitutional as depriving such railroads of property without due process of law, or as denying equal protection of the law, or as interfering with or burdening interstate commerce. *St. Louis, I. M. & S. Ry.* v. *Arkansas.* 518

Granting writ of mandamus requiring railroad to comply with order of state commission, which is prima facie lawful, pending determination of suit to enjoin enforcement of order, *held,* in view of circumstances and requirement that bond of indemnity be given, not to deprive railroad of due process of law. *Detroit & M. Ry.* v. *Michigan Railroad Comm.* 564

Quære, whether trunk line can object to order of Interstate Commerce Commission on ground that allowance to connecting lines is too small and deprives it of opportunity to pay larger amount and obtain the business. *O'Keefe* v. *United States.* 294

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RATE REGULATION:

Where no undue discrimination against shipper or locality of its plant is found, and community declared prejudiced has not complained and is not party to proceeding, and rate com-

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plained of is intrinsically reasonable, mere fact that other carriers have adopted lower schedule from shipper's district to points other than one designated, affords no foundation for Commission's finding that rate unreasonable and erroneous as matter of law, and its order should be enjoined. *Philadelphia & Reading Ry.* v. *United States* 334
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Requirement in § 60 of Bankruptcy Act construed. *Carey* v. *Donohue*. 430
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REFORMATION OF INSTRUMENTS. See **Contracts.**

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RELATION:
Title of trustee in bankruptcy relates back to date of filing petition. *Fairbanks Steam Shovel Co.* v. *Wills*. 642
Formal approval of survey by Commissioner of Land Office does not so relate back to date of grant or field survey as to destroy power of Congress to dispose of lands while unsurveyed. *United States* v. *Morrison*. 192

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Rescission of government contract to supply articles at specified prices is no obstacle to recovery upon quantum valebat if requisite proof of value of articles delivered. *Crocker* v. *United States* 74
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REMOVAL OF CAUSES:
Where State, suing on behalf of depositors of bank, is an actual party plaintiff, case cannot be removed; nor where State merely nominal party if none of distinct judgments to be rendered in favor of any individual is large enough to confer jurisdiction, although the aggregate amount is. *Title Guaranty Co.* v. *Allen* 136

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Sections 3220, 3226, 3227 do not violate due process of law under Fifth Amendment. *Dodge* v. *Osborn*..... 118

Provisions of §§ 3220, 3226, 3227 are applicable to proceeding for recovery of taxes illegally collected under Income Tax Act. *Id.*

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Section 3394 does not attempt to protect and enforce permission as to retail sales within States. *Rast* v. *Van Deman & Lewis*..... 342

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Rights in land below mean high water line of navigable and tidal river are subordinate to public right of navigation and power of Congress to employ all appropriate means to keep river navigable. *Willink* v. *United States*..... 572

Congress may prevent renewal of obstructions below mean high water which may affect navigation; and owner is not entitled to compensation therefor. *Id.*

Riparian owner held not entitled to recover as upon an implied contract for taking his property by reason of damages alleged in consequence of exercise of power of Congress over navigable waters. *Id.*

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Regulations of retail sales within State held not to amount to attempt to control interstate commerce. *Rast* v. *Van Deman & Lewis*..... 342

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Expenditures, other than payment to State, by intended acceptor of offer to sell public lands, are but voluntary qualifications to become purchaser and are not binding upon him or the State. *Id.*

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SECRETARY OF WAR:

Mere location of harbor lines does not amount to taking of property within lines or its appropriation to public use; nor does taking result from request of officer of United States to riparian owner to vacate, if such request not acceded to or enforced. *Willink* v. *United States* 572

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A state commission appointed to close up business in which State engaged, held to have had jurisdiction to consider, find and offset claims of State against one claiming for supplies furnished, and by doing so did not deprive claimant of its property without due process of law. *Carolina Glass Co.* v. *South Carolina* 305

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SOUTH CAROLINA:

Dispensary Commission appointed to close up dispensary business held to have had jurisdiction to consider, find and set off claims of State against one claiming for supplies furnished, and by doing so did not deprive claimant of property without due process of law: that while commission was without authority to enter overjudgment against claimant for excess of State's claim after offset, doing so did not affect

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STARE DECISIS:
Where objections to constitutionality of provisions of c. 135, Kansas Laws, 1913, taxing foreign corporations doing business in State for such privilege measured on proportion of stock used in State, rest in this case exclusively on asserted invalidity of similar provisions of same statute relative to domestic corporations, which have been found untenable, case controlled by former decision. *Lusk* v. *Kansas*. 236

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Due process under Fourteenth Amendment does not prevent State from placing upon bank commissioner duty of closing bank found upon examination to be insolvent without first instituting proceedings and obtaining award. *Title Guaranty Co.* v. *Allen* 136
An act of Congress which leaves subject with which Congress has power to deal unprovided for does not necessarily take matters within unprovided area out of any possible state action. *Innes* v. *Tobin* 127
Regulation of common carriers: State, acting through administrative body, may require railroads to make physical track connections where public necessity exists therefor. *Seaboard Air Line* v. *Georgia R. R. Comm.* 324
In determining whether such public necessity exists just regard should be given to probable resulting advantages and to necessary expense involved. *Id.*
Power over interstate commerce: State cannot lay tax on

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interstate commerce in any form, either upon business constituting such commerce, or privilege of engaging in it, or receipts as such derived therefrom. *Kansas City Ry.* v. *Kansas*. 227

Whether state tax prohibited by commerce clause depends upon operation and effect as enforced and not upon characterization. *Id.*

Police power: State may regulate use of, and impose license taxes on, privilege of using profit sharing coupons and trading stamps. *Rast* v. *Van Deman & Lewis* 342

Tanner v. *Little*. 369

Pitney v. *Washington* 387

Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, held proper exercise of police power, and not unconstitutional as interfering with or burdening interstate commerce, impairing obligation of contracts, or denying equal protection or due process of law. *Tanner* v. *Little* 369

Pitney v. *Washington*. 387

It is within power of legislature to consider use of profit sharing coupons and trading stamps as having evils similar to a lottery. *Rast* v. *Van Deman & Lewis* 342

Regulation by State of use of profit sharing coupons and trading stamps in connection with sales of tobacco not prohibited by § 3394, Rev. Stat., as amended. *Id.*

If business subject to regulation by State and imposition of privilege taxes, contracts made in its conduct are also subject to such regulation. *Id.*

Taxation by: State may not tax Federal instrumentality for privilege of performing its functions. *Fidelity & Deposit Co.* v. *Pennsylvania* 319

Mere contracts between United States and private corporation do not make it an essential governmental agency and confer freedom from state control. *Id.*

Act of 1894, allowing certain corporations to be accepted as surety does not create them Federal instrumentalities free from state laws and taxation. *Id.*

Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891 and 1905 are under protection of Government; lessee is Federal instrumentality; and State cannot tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. *Indian Oil Co.* v. *Oklahoma* 522

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Legislature may create taxing district to meet expense of local improvements without encountering Fourteenth Amendment, unless action palpably arbitrary or plain abuse. *Gast Realty Co.* v. *Schneider Granite Co.* 55

State not debarred from taxing granted privilege of being corporation because corporation may be engaged in interstate commerce. *Kansas City Ry.* v. *Kansas*..... 227

State may tax domestic corporation for privilege of being such, and such tax not necessarily invalid because measured on capital stock part of which may represent capital not taxable by State. *Id.*

State has broad discretion as to tax exemptions. *Rogers* v. *Hennepin County*..... 184

State may fix situs of memberships in an exchange for purpose of taxation, and in so doing does not deprive nonresident members of property without due process of law. *Id.*

Public lands: Where State makes general offer to sell and provides for determination of conflicting claims of right to purchase, it is not bound by offer or precluded from withdrawing it until rightful claimant determined and payment of at least an installment of purchase price. *Banning Co.* v. *California*..... 142

Expenditures, other than payment to State, by intended acceptor of offer to sell public lands, are but voluntary qualifications to become purchaser and are not binding on him or the State. *Id.*

Quære, whether State may await extinguishment of forest reserve including lands granted, but title to which not vested, and then take granted lands. *United States* v. *Morrison*..... 192

Extradition: Act of 1793 (§ 5278, R. S.) was enacted for purpose of controlling interstate rendition, and so far as its provisions operated, was exclusive of state power. *Innes* v. *Tobin*..... 127

Commissions: A state commission appointed to close up business in which State engaged, *held* to have had jurisdiction to consider, find and offset claims of State against one claiming for supplies furnished, and by doing so did not deprive claimant of its property without due process of law. *Carolina Glass Co.* v. *South Carolina*..... 305

Such commission having found that claimant was indebted to State in excess of its claim and entered an overjudgment

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therefor, *held* that, although such overjudgment was rendered without authority that fact did not affect power of commission to withdraw funds from county depositaries as they were state funds and subject to its control. *Id.*

Creditor of State cannot assert rights against withdrawal by state officers of funds of State under their control in regard to which State had not consented to be sued; and *held*, that such withdrawal did not amount to impairment of contract obligations. *Id.*

Suits by and against: Funds of State Dispensary of South Carolina held funds of State, and a suit against members of Dispensary Commission in effect a suit against State not maintainable in Federal court. *Carolina Glass Co.* v. *South Carolina* 305

Cause to which State a party not removable into Federal court. *Title Guaranty Co.* v. *Allen*. 136

STATUTES. See **Congress; Construction.**

STOCK AND STOCKHOLDERS:

In suit in equity by stockholder of corporation against other corporations to recover under § 7 of Anti-Trust Act, court cannot enter decree requiring plaintiff's corporation to sue other corporations or permitting him to sue in its name and behalf. *Fleitmann* v. *Welsbach Co* 27

As to right of stockholder to enjoin corporation from voluntarily paying unconstitutional tax. See *Brushaber* v. *Union Pacific R. R. Co* 1

STREET CAR COMPANIES. See **Interstate Commerce.**

STREETS AND HIGHWAYS. See **Railroads.**

SUCCESSIONS:

Right to succeed to property of decedent depends upon and is regulated by state law. *Uterhart* v. *United States*. 598

On the construction of will by state court, *held*, that interests of residuary legatees were contingent prior to July 1, 1902, within meaning of Refunding Act of 1902, except as to such amounts as were actually paid to legatees prior to that date. *Id.*

Deed made by resident of one State to person of another State as trustee for certain beneficiaries of personal property, donor retaining income for life and power of appointment, which was not exercised, *held* not to amount to transfer; and

SUCCESSIONS—*Continued.* PAGE

inheritance tax levied by State of donor's residence on whole fund as upon a transfer intended to take effect in enjoyment after donor's death, sustained. *Bullen* v. *Wisconsin* 625

Imposition of inheritance tax on property passing by deed in trust, by State of donor's residence, *held* not unconstitutional as impairing obligation of contract or depriving beneficiaries of trust of property without due process of law because State where property situated had imposed inheritance tax thereon. *Id.*

SUIT AGAINST STATE. See **South Carolina.**

SURETY COMPANIES:

Act of 1894, allowing certain corporations to be accepted as surety does not create them Federal instrumentalities free from state laws and taxation. *Fidelity & Deposit Co.* v. *Pennsylvania* 319

SURVEYS. See **Public Lands.**

TAP LINE RAILWAYS. See **Interstate Commerce Commission.**

TARIFFS. See **Interstate Commerce.**

TAXES AND TAXATION:

I. **Subjects of taxation.**

Nothing in Constitution prevents taxation of membership in exchange restricted in use. *Rogers* v. *Hennepin County.* 184

Such membership held property, notwithstanding restrictions upon use, and subject to taxation. *Id.*

Whether such memberships are taxable under state statutes is a matter of local law. *Id.*

State not debarred from taxing granted privilege of being corporation because corporation may be engaged in interstate commerce. *Kansas City Ry.* v. *Kansas* 227

State may tax domestic corporation for privilege of being such, and such tax not necessarily invalid because measured on capital stock part of which may represent capital not taxable by State. *Id.*

Tax imposed by c. 135, Kansas Laws, 1913, on privilege of being corporation, is not as to domestic corporation engaged in both interstate and intrastate commerce, invalid either as violation of commerce clause, or of due process clause, of Constitution. *Id.*

TAXES AND TAXATION—*Continued.* PAGE

State cannot lay tax on interstate commerce in any form, either upon business constituting such commerce, or privilege of engaging in it, or receipts as such derived therefrom. *Id.*

Whether state tax prohibited by commerce clause depends upon operation and effect as enforced and not upon characterization. *Id.*

Tax upon lease made is one on power to make lease. *Indian Oil Co.* v. *Oklahoma* 522

Leases that cannot be taxed as entity cannot be taxed vicariously by taxing stock of corporation owning them where only value of stock is value of the leases. *Id.*

Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891 and 1905 are under protection of Government; lessee is Federal instrumentality; and State cannot tax its interest in the leases either directly or as the leases are represented by the capital stock of the corporation owning them. *Id.*

State may not tax Federal instrumentality for privilege of performing its functions. *Fidelity & Deposit Co.* v. *Pennsylvania* 319

Pennsylvania law of 1895, imposing taxes on premiums collected by certain classes of insurance companies, is not, as applied to premiums on bonds of Federal government officials by surety companies under act of 1894, unconstitutional as interference with powers of government. *Id.*

State may impose license taxes on privilege of using profit sharing coupons and trading stamps. *Rast* v. *Van Deman & Lewis* 342

Tanner v. *Little* 369

Pitney v. *Washington* 387

II. **Situs for taxation.**

State may fix situs of memberships in an exchange for purpose of taxation, and in so doing does not deprive nonresident members of property without due process of law. *Rogers* v. *Hennepin County* 184

III. **Valuation for taxation.**

Correct valuation of property a matter for taxing officials; and, where no charge of denial of opportunity to be heard, this court does not review their judgment. *Id.*

IV. **Classification in taxation.**

Taxation of memberships in exchanges wherein business transactions conducted for profit not a denial of equal pro-

TAXES AND TAXATION—*Continued.* PAGE

tection because memberships in other associations, not conducting business exchanges and where there are manifest distinctions, are not also taxed. *Id.*

V. **Double taxation.**

Memberships in incorporated exchange, as property of respective members, are distinct from assets of corporation, and taxing members on membership and corporation on assets not double taxation. *Id.*

VI. **Exemptions.**

State has broad discretion as to tax exemptions. *Id.*

VII. **Restraining payment and collection.**

Under proper averments stockholder's suit to restrain corporation from voluntarily paying tax charged to be unconstitutional, is not violative of § 3224, Rev. Stat. *Brushaber* v. *Union Pacific R. R. Co.* 1

Suit not maintainable to enjoin assessment or collection of tax because of alleged unconstitutionality of statute imposing it. *Dodge* v. *Osborn*. 118

That many suits would have to be brought to recover taxes paid under unconstitutional statute and that meantime taxes imposed become lien and constitute cloud on title, *held* inadequate to sustain jurisdiction of equity to restrain collection. *Id.*

VIII. **Validity in general.**

Validity of each tax decided upon own facts, and tax within taxing power of State not condemned as unconstitutional unless natural operation and effect render it prohibited exaction. *Kansas City Ry.* v. *Kansas*. 227

Even though statutory tax prohibitory, right to carry on business by using trading stamps and profit sharing coupons is not so protected by Constitution as to render tax a violation of due process of law. *Rast* v. *Van Deman & Lewis* . . . 342

St. Louis street paving ordinance held to subject property owners to disproportionate taxation and therefore unconstitutional. *Gast Realty Co.* v. *Schneider Granite Co* 55

Florida statute of 1913, imposing license taxes on merchants using profit sharing coupons and trading stamps does not deprive of due process of law because of severity of its penalties intimidating against testing legality. *Rast* v. *Van Deman & Lewis* 342

IX. **Inheritance taxes.**

Imposition on property passing by deed in trust, by State of donor's residence, held not unconstitutional as impairing

TAXES AND TAXATION—*Continued* PAGE

obligation of contract or depriving beneficiaries of trust of property without due process of law because State where property situated had imposed inheritance tax thereon. *Bullen* v. *Wisconsin* 625

Deed made by resident of one State to person of another State as trustee for certain beneficiaries of personal property, donor retaining income for life and power of appointment, which was not exercised, held not to amount to transfer; and inheritance tax levied by State of donor's residence on whole fund as upon a transfer intended to take effect in enjoyment after donor's death, sustained. *Id.*

X. **Districts; establishment of.**

Legislature may create taxing districts to meet expense of local improvements without encountering Fourteenth Amendment, unless action palpably arbitrary or plain abuse. *Gast Realty Co.* v. *Schneider Granite Co.* 55

The law does not attempt imaginary exactness or go beyond reasonable probabilities in establishing taxing districts. *Id.*

Law establishing district under which there is no reasonable presumption that justice will be done, but under which parties will probably be disproportionately taxed, cannot stand as constitutional against one actually so taxed. *Id.*

Where district established by delegated authority it is essential to due process of law that landowners have opportunity to be heard on question of benefits. *Embree* v. *Kansas City Road District.* 242

Where statute delegating authority for establishment of district provides for hearing on question of benefits, decision of designated tribunal sufficient, and, unless made fraudulently or in bad faith, due process not denied. *Id.*

Adequate hearing may be had before a delegated tribunal authorized to establish taxing districts for roads and to declare what lands shall be included therein as benefited and due process accorded owners, although particular roads to be improved not designated. *Id.*

A legislative act establishing zones of benefits with graduated ratings for assessments in districts lawfully created, does not deny due process of law where it does not provide for a hearing on this particular feature, unless legislative apportionment so arbitrary and devoid of reasonable basis as to amount to abuse of power. *Id.*

Statute requiring adequate public notice of time and place of presentation of petition for creation of tax district and

TAXES AND TAXATION—*Continued.* PAGE

providing for presentation of remonstrances with power to designated tribunal to hear petition and remonstrances and make such changes in boundaries of proposed district as public good may require, contemplates a hearing, and authorizes tribunal to so adjust boundaries as to include only such lands as may reasonably be expected to be benefited. *Id.*

Although no hearing afforded owners of land within district on appraisal of their lands for purpose of apportioning tax, due process not denied if such hearing accorded when tax sought to be enforced. *Id.*

Missouri laws providing for establishment of road improvement districts not unconstitutional under due process provision of Fourteenth Amendment. *Id.*

XI. **Federal taxation.**

Constitution recognized the two great classes of taxation as direct and indirect and applied rule of apportionment as to former and uniformity as to latter; but by Sixteenth Amendment all income taxes are relieved from rule of apportionment. *Brushaber* v. *Union Pacific R. R. Co* 1

Sixteenth Amendment obviously intended to simplify situation and make clear limitations on taxing power of Congress and not to create radical and destructive changes in constitutional system. *Id.*

Uniformity of taxation required by Constitution is geographical. *Id.*

Fifth Amendment is not a limitation upon taxing power conferred upon Congress. *Id.*

Arguments as to expediency of levying tax within power of Congress are beyond judicial cognizance. *Id.*

When there are differences between subjects taxed, Congress does not transcend limit of power by taxing them differently. *Id.*

Want of due process of law does not arise from want of wisdom in Congress in levying taxes and give courts power to overrule action of Congress by declaring it to be unconstitutional. *Id.*

Independently of operations of Sixteenth Amendment, a tax on product of mine is not a tax upon property as such because of its ownership, but is a true excise. *Stanton* v. *Baltic Mining Co* 103

Requiring appeal to Commissioner of Internal Revenue after payment of taxes and giving right to sue only after his

TAXES AND TAXATION—*Continued.* PAGE
refusal to refund does not violate due process of law. *Dodge* v. *Osborn* 118
See **Income Tax; War Revenue Act.**

THIRTEENTH AMENDMENT. See **Constitutional Law, VII.**

TIME. See **Appeal and Error.**

TITLE:
Tenant is not estopped to show that landlord's title has expired or been terminated by operation of law. *Johnson* v. *Riddle*. 467
One knowingly taking property of another cannot by changing its form or commingling it with property of his own acquire title by accession. *Union Naval Stores Co.* v. *United States*. 284
Title of trustee in bankruptcy relates back to date of filing petition. *Fairbanks Steam Shovel Co.* v. *Wills*. 642
See **Indian Lands.**

TONNAGE DUES. See **Maritime Law.**

TORTS:
Actions of tort are transitory. *Kansas City Ry.* v. *McAdow* 51

TRACK CONNECTIONS. See **Railroads.**

TRADE-MARKS:
Right to use is property of which owner entitled to exclusive enjoyment to extent that it has been actually used, and infringer is required in equity to account for his gains. *Hamilton Shoe Co.* v. *Wolf Brothers*. 251
"The American Girl," as applied to women's shoes, not geographical or descriptive, nor indicative of qualities or characteristics of article, and is subject to appropriation as trade-mark. *Id.*
Use of label "American Lady" *held* to infringe trade-mark "American Girl." *Id.*
Although decree below based on profits gained in unfair competition, as proofs and findings were applicable to claim of compensation for infringing trade-mark to which claimant found entitled, decree affirmed. *Id.*
Where defendant not an innocent infringer and apportionment between profits attributable to infringement and those attributable to intrinsic merit of article inherently impossi-

TRADE-MARKS—*Continued.* PAGE
ble, complainant not limited in recovery to former, nor is burden on him to show what such portion of profits was. *Id.*
Owner entitled to so much of profit as resulted to infringer from use of mark; and rather that owner have all the profit than that he be deprived of any portion thereof. *Id.*
In suit for infringement decree based on Master's finding as to amount of profits to which complainant entitled not disturbed. *Id.*
Where neither of parties, citizens of different States, has registered trade-mark in dispute, and no local rule is shown, cases involving use of such trade-mark determined according to applicable common-law principles. *Hanover Star Milling Co.* v. *Metcalf* 403
Redress accorded in trade-mark cases is based upon party's right to be protected in good will of business; and English rule that only property in trade-mark is in connection with existing business prevails generally in this country. *Id.*
Common law of trade-marks is but part of law of unfair competition. *Id.*
Property in common law trade-marks and right to exclusive use grows out of use and not mere adoption. *Id.*
Question of prior appropriation legally insignificant in absence of intent on part of later adopter to take benefit of reputation or to forestall extension of the trade of the earlier adopter. *Id.*
While property in trade-mark not limited so far as its use has extended, by territorial bounds, earlier adopter may not monopolize markets that his trade has never reached and where mark signifies goods of another. *Id.*
So far as controversy over trade-mark concerns intrastate distribution, subject not within sovereign power of United States. *Id.*
Trade-mark rights may be lost by abandonment, non-user, laches or acquiescence. *Id.*
Where later adopter, in good faith and without notice of its use in other territory by earlier adopter, expends money and effort in building up trade in territory which earlier adopter has left unoccupied for a long time and into which his trade would not naturally expand, latter estopped to assert infringement in that territory. *Id.*
A third party entering territory of one entitled to use trade-mark and attempting to use same in manner which, through

TRADE-MARKS—*Continued.* PAGE
similarity of package, is deceiving, is guilty of unfair competition, from which protection will be accorded. *Id.*
Where jurisdiction of District Court in trade-mark case rests on diversity of citizenship, decision of Circuit Court of Appeals is final and can only be reviewed on certiorari. *Id.*
See **Unfair Competition.**

TRADING STAMPS:
State may regulate use of, and impose license taxes on, privilege of using profit sharing coupons and trading stamps.
Rast v. *Van Deman & Lewis*..... 342
Tanner v. *Little* 369
Pitney v. *Washington*..... 387
Regulation by State of use of profit sharing coupons and trading stamps in connection with sales of tobacco not prohibited by § 3394, Rev. Stat., as amended. *Rast* v. *Van Deman & Lewis*..... 342
Discernment and correction of evils resulting from use of profit sharing coupons and trading stamps is within legislative authority. *Id.*
Regulation of use of profit sharing coupons and trading stamps in connection with retail sales to individual purchasers and consumers and not designed to be used by manufacturer from another State to State of distribution, does not interfere with or burden interstate commerce. *Id.*
Florida statute of 1913, imposing special license taxes on merchants using such coupons and stamps, is not unconstitutional as impairing obligation of contracts, as it must be construed as having prospective operation. *Id.*
In conducting retail business, use of such coupons and stamps is not advertising pure and simple; there is a distinction. *Id.*
It is within power of legislature to consider use of such coupons and stamps as having evils similar to a lottery. *Id.*
Even though statutory tax prohibitory, right to carry on business by using such stamps and coupons is not so protected by Constitution as to render tax a violation of due process of law. *Id.*
Statute of Washington of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, *held* proper exercise of police power, and not unconstitutional as interfering with or burdening interstate commerce, im-

TRADING STAMPS—*Continued.* PAGE
pairing obligation of contracts, or denying equal protection or due process of law. *Tanner* v. *Little* 369
Pitney v. *Washington* 387
Quære, whether statute relating to profit sharing coupons and trading stamps redeemable exclusively in cash and credit on purchase is objectionable. *Rast* v. *Van Deman & Lewis* 342

TRANSPORTATION. See **Interstate Commerce.**

TREATIES. See **Indian Lands.**

TRESPASS. See **Public Lands.**

TRIAL:
Rule that party not entitled to sit silent until after verdict and then insist that it be set aside for failure of court to particularly specify in its charge some matter to which its attention had not been suitably called, is not altered by Minnesota statute under which errors may be specified on motion for new trial without taking exceptions. *Illinois Central R. R.* v. *Skaggs* 66
Under local practice in Nebraska, where trial by jury is waived in action at law, findings made by trial court have force and effect of verdict of jury, and hearing in supreme court is not trial de novo. *Jones National Bank* v. *Yates* 541

TRIPLE DAMAGES. See **Anti-Trust Act.**

TRUNK AND TAP LINES. See **Interstate Commerce Commission.**

TRUSTS AND TRUSTEES:
Trusts for life with income free from interference or control of creditors are, in Massachusetts, valid and effective against creditors and, under certain conditions, against assignees and trustees in bankruptcy. *Eaton* v. *Boston Trust Co* 427
Deed made by resident of one State to person of another State as trustee for certain beneficiaries of personal property, donor retaining income for life and power of appointment, which was not exercised, *held* not to amount to transfer; and inheritance tax levied by State of donor's residence on whole fund as upon a transfer intended to take effect in enjoyment after donor's death, sustained. *Bullen* v. *Wisconsin* 625
See **Bankruptcy.**

UNFAIR COMPETITION: PAGE

User of unregistered design, similar to that of earlier user, may be enjoined from further use, but may not be charged with profits if original imitation unintentional and there was no deceit or substitution of goods in fact. *Straus* v. *Notaseme Co.* 179

Where supposed unfairness consisted mainly in use of device that earlier user unsuccessfully sought to have registered, relief denied. *Id.*

See **Trade-Marks.**

UNITED STATES:

In a proper case reformation of a contract may be required against the United States, notwithstanding § 3744, Rev. Stat. *Ackerlind* v. *United States.* 531

Oil leases of land in Oklahoma made by Osage Indians under authority of acts of 1891, 1905, are under protection of Government; lessee is Federal instrumentality, and State cannot tax its interest in the leases. *Indian Oil Co.* v. *Oklahoma* ... 522

Where officers charged with matter have refused offer for use of invention, and have declined to use it, and, proceeding independently, make and use articles designed by themselves, claimed by patentee to embody his invention, there is no implied contract on part of Government to pay for use of invention; and Court of Claims without jurisdiction of claim prior to act of 1910. *Farnham* v. *United States.* 537

It is essential that suit in name of United States to cancel homestead patent be brought with approval of Attorney General, and it is sufficient if United States is represented in this court by assistant attorney general and there is production of letter of Attorney General authorizing the suit. *Causey* v. *United States* 399

Rule applicable to private contracts that vendor seeking to rescind must be ready to return consideration, not applicable to Government in suit to cancel patent for land. *Id.*

So far as controversy over trade-mark concerns intrastate distribution, subject not within sovereign power of United States. *Hanover Star Milling Co.* v. *Metcalf.* 403

See **Congress; President; Public Lands.**

VALUATION:

Correct valuation of property a matter for taxing officials; and, where no charge of denial of opportunity to be heard, this court does not review their judgment. *Rogers* v. *Hennepin County* 184

VARIANCE. See **Pleading.** PAGE

VENDOR AND VENDEE:
Rule applicable to private contracts that vendor seeking to rescind must be ready to return consideration, not applicable to Government in suit to cancel patent for land. *Causey* v. *United States*. 399

VESSELS. See **Maritime Law.**

VESTED AND CONTINGENT INTERESTS. See **War Revenue Act.**

WAIVER:
Question of capacity of trustee in bankruptcy to sue waived if not raised in trial court. *Fairbanks Steam Shovel Co.* v. *Wills* 642
Controversies in case brought in Federal court depending alone upon right to sue because of district in which parties reside, may be waived. *Male* v. *Atchison, T. & S. F. Ry*. . . 97
Effect of appearance as waiver of objection in bankruptcy proceedings. See *Fairbanks Steam Shovel Co.* v. *Wills*. . . . 642

WAREHOUSEMEN:
Transportation, as regulated by Commerce Act, includes services of connecting carrier as warehouseman of goods after arrival at destination and before actual delivery. *Southern Ry.* v. *Prescott*. 632
Under stipulation in bill of lading of interstate shipment, that carrier liable as warehouseman only for goods after arrival at destination and not removed within specified time, carrier liable only for negligence; and if loss admittedly by fire, burden is on plaintiff to prove negligence, notwithstanding rule under state law. *Id.*

WAR REVENUE TAX:
On the construction of will by state court, *held*, that interests of residuary legatees were contingent prior to July 1, 1902, within meaning of Refunding Act of 1902, except as to such amounts as were actually paid to legatees prior to that date. *Uterhart* v. *United States*. 598

WASHINGTON:
Statute of 1907, imposing license taxes on privilege of using profit sharing coupons and trading stamps, held proper exercise of police power, and not unconstitutional as interfering with or burdening interstate commerce, impairing

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obligation of contracts, or denying equal protection or due process of law. *Tanner* v. *Little*. 369
Pitney v. *Washington* 387

WATERS. See **Navigable Waters; Riparian Rights.**

WILLS:
Judicial construction by state court of competent jurisdiction determines legally and practically extent and character of interests taken by legatees. *Uterhart* v. *United States*. . . 598

WORDS AND PHRASES:
"The American Girl," as applied to women's shoes, not geographical or descriptive, nor indicative of qualities or characteristics of article, and is subject to appropriation as trade-mark. *Hamilton Shoe Co.* v. *Wolf Brothers* 251
"Next of kin" in Employers' Liability Act not used in common-law significance. *Seaboard Air Line* v. *Kenney* . . 489
"Officer" as used in § 32, Crim. Code. See *Lamar* v. *United States*. 60

WRIT AND PROCESS. See **Appeal and Error; Certiorari; Injunction; Prohibition.**

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